Supreme Court, U.S.
FILED

No. 98 788 NOV 5 1998

OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1998

CYNTHIA E. CANADY, *et al.*,

Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the petition for certiorari should be granted to preserve the integrity of this Court's decisions in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972)?

2. Whether the petition for certiorari should be granted to preserve the integrity of the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*?

PARTIES TO THE PROCEEDINGS BELOW

Petitioners:

Cynthia E. Canady; Marva Jean Saunders; Mischelle A. Greer; Jimmy D. Hunt; Tamara A. Hunt; Kim Y. Nickerson; Esther E. Moten; Kerry L. Butler; Nadine Farris; Charles Lockridge; Coleman McClain; Evalin McClain; Alma Hammonds; John Hammonds; Sara Kenner; and Clarence Kenner.

Respondents:

Allstate Insurance Company; American Economy Insurance Company; American Family Mutual Insurance Company; American States Insurance Company; American States Preferred Insurance Company; Farm Bureau Town & Country Insurance Company; Farmers & Merchants Insurance Company; Farmers Insurance Exchange; Federal Insurance Company; Fire Insurance Exchange; Liberty Mutual Insurance Company; Mid-Century Insurance Company; Old Reliable Casualty Company; Pacific Indemnity Insurance Company; Prudential Property & Casualty Company; Safeco Insurance Company; Sea Insurance Company of America; Shelter General Insurance Company; Shelter Mutual Insurance Company; State Farm Fire & Casualty Company; State Farm General Insurance Company; Sun Insurance Office of America, Inc.; and Vigilant Insurance Company.

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STATEMENT OF JURISDICTION

The court of appeals entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on August 7, 1998 (App., *infra*, 1a). The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 804 of the Fair Housing Act as amended, 42 U.S.C. § 3604 (App., *infra*, 58a), provides that it is unlawful:

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

Section 813(a) of the Fair Housing Act as amended, 42 U.S.C. § 3613(a) (App., *infra*, 58a), provides that:

> (1)(A) An aggrieved person may commence a civil action in an appropriate United States district court

> or State court not later than 2 years after the occurrence or the termination of an alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

STATEMENT OF THE CASE

Petitioners are homeowners in minority areas of Kansas City, Missouri, and St. Louis, Missouri, who have asserted claims of discriminatory insurance "redlining" against each defendant insurance company. Redlining is a practice whereby insurance companies discriminate against homeowners in minority neighborhoods by refusing to sell them homeowners insurance on equal terms (or in many cases, at all) based upon the racial composition of their neighborhoods. Insurance redlining is a major problem in urban areas generally, and Missouri is no exception — the Missouri Department of Insurance has specifically concluded that "the big white insurers, by some conscious or unconscious stratagem, are redlining."

To remedy the injuries caused by redlining and to enjoin such redlining in the future, petitioners filed claims against each defendant company under Section 813 of the Fair Housing Act, 42 U.S.C. § 3613. Petitioners filed their claims both on behalf of themselves and a class of similarly situated minority homeowners. Petitioners asserted that each defendant company had discriminated against minority homeowners using a wide array of techniques, such as: (i) explicitly refusing to sell homeowners insurance at all within minority neighborhoods; (ii) steering agents away from minority neighborhoods; (iii) maintaining special underwriting and sales rules for

homeowners in minority neighborhoods; (iv) failing to establish and maintain offices or agents within minority neighborhoods; (v) steering minority homeowners into buying "limited" policies; (vi) charging higher rates in minority neighborhoods; and (vii) using underwriting guidelines designed to have a disparate impact on homeowners in minority neighborhoods, without any valid business justification. (Third Amended Complaint at ¶48, App., *infra*, 43a-45a).

Each petitioner established standing to sue companies with which he or she had not dealt directly by asserting that he or she had "suffered common damages in the form of a relative and/or absolute diminution in the value of their properties." *Id.* at ¶46 (App., *infra*, 43a). Petitioners explicitly claimed that they and every class member have "suffered these damages, whether they have ever personally dealt with the defendants or not, and regardless of their own personal experiences with homeowners insurance." *Id.*

Respondents immediately moved to dismiss based on lack of standing, arguing that not every petitioner had direct business dealings with every defendant insurer. Citing this Court's decisions in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979); and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), petitioners responded that they had standing to sue the insurance companies with which they had not dealt directly based upon a theory of indirect injury — *i.e.*, that the insurers' redlining practices lowered the property values of their homes located in minority neighborhoods.

Initially, the district court correctly held that petitioners' indirect injury claims should go forward. It recognized that "[p]laintiffs in this case . . . are those who are the most directly affected, economically and non-economically, by the alleged

redlining practices of all named defendants," and accordingly, "there are no persons better suited to make . . . challenges" to those practices. (App., *infra*, 27a).

After a short period of limited discovery, petitioners moved for class certification. The district court seized this opportunity to revisit the standing issue *sua sponte*, and it reversed its earlier decision regarding claims of indirect injury. It ruled that petitioners "lack standing to bring claims against defendants against whom they have alleged no direct injury." (App., *infra*, 20a). Based upon this sudden reversal in position, the district court dismissed all of petitioners' claims, including even the claims of those petitioners who had direct dealings with specific insurers. *Id.*

Petitioners promptly appealed the dismissal of their claims to the United States Court of Appeals for the Eighth Circuit, and challenged the ruling that they could not base their claims upon a theory of indirect injury. The Eighth Circuit adopted the district court's opinions and denied petitioners' appeal without further analysis. (App., *infra*, 2a).

REASONS FOR GRANTING THE WRIT

The district court's opinion (as adopted by the Eighth Circuit) conflicts directly with three prior opinions of this Court. Congress drafted the Fair Housing Act to allow suits to be brought by *all* persons affected by illegal discrimination, not just by the direct targets of such discrimination. This Court has therefore repeatedly held that standing under the Fair Housing Act extends as broadly as is permitted by Article III of the Constitution, and that a plaintiff asserting claims under the Fair Housing Act has standing to assert claims of indirect injury — *i.e.*, injury suffered as a result of discrimination directed at someone else. *See Havens Realty Corp. v. Coleman*, 455 U.S.

363, 372 (1982); *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 109 (1979); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972).

The district court (and the Eighth Circuit) refused to follow this line of precedent, instead holding that petitioners "lack standing to bring claims against defendants against whom they have alleged no direct injury." The lower courts' defiance of such clearly established law directly threatens this Court's authority. In addition, the rulings threaten the enforcement structure carefully crafted by Congress for dealing with housing discrimination claims. If left uncorrected, the lower court rulings will affect not only the 93,000 homeowners seeking relief in this case, but also all other persons in the country victimized by redlining practices, as well as similar illegal practices such as steering or blockbusting. The Court therefore should exercise its supervisory powers, summarily vacate the lower court rulings, and remand this case for further proceedings consistent with the Court's holdings in *Havens*, *Gladstone, Realtors* and *Trafficante*.

I.

THE COURT HAS REPEATEDLY HELD THAT INDIRECT INJURY CLAIMS ARE FUNDAMENTAL TO THE ENFORCEMENT OF THE FAIR HOUSING ACT.

The lower courts' reading of the Fair Housing Act as allowing only claims based upon direct injury runs directly counter to three separate opinions of this Court. The lower court decisions should therefore be summarily vacated, and the case should be remanded for application of the law established by this Court.

A. The *Trafficante* Decision

This Court first considered the broad scope of the Fair Housing Act in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972). *Trafficante* involved residents of a San Francisco apartment complex, both black and white, who filed suit based upon their landlord's discrimination against non-white rental applicants. *See id.* at 207-08. The Ninth Circuit Court of Appeals construed the Fair Housing Act narrowly, stating (as did the lower courts in this case) that the Act permits "complaints only by persons who are the objects of discriminatory housing practices." *Id.* at 208.

In a unanimous decision, this Court reversed the narrow construction advanced by the Ninth Circuit. The Court began by noting that the language of the Fair Housing Act "is broad and inclusive." *Id.* at 209. The Court further found that the statute's language evidenced "a congressional intention to define standing as broadly as is permitted by Article III of the Constitution." *Id.* The Court also relied on the Act's legislative history, which showed that:

> While members of minority groups were damaged the most from discrimination in housing practices, the proponents of the legislation emphasized that those who were not the direct objects of discrimination had an interest in ensuring fair housing, as they too suffered.

Id. at 210 (citing *Hearings before the Subcommittee on Housing & Urban Affairs of the Senate Committee on Banking & Currency on S. 1358, S. 2114, and S. 2280*, 90th Cong., 1st Sess. (1967)); *see also id.* at 211 ("[t]he person on the landlord's blacklist is not the only victim of discriminatory housing practices; it is, as Senator Javits said in supporting the bill, 'the whole community' ") (quoting 114 Cong. Rec. 2706).

Finally, the Court emphasized that "complaints by private persons are the primary method of obtaining compliance with the Act." *Id.* at 209. Because "HUD has no power of enforcement," the primary enforcers of the Fair Housing Act are "private attorneys general" whose task it is to "vindicat[e] a policy that Congress considered to be of the highest priority." *Id.* at 210-11. These private attorneys general necessarily include

> not only those against whom a discrimination is directed but also those whose complaint is that the manner of managing a housing project affects "the very quality of their daily lives."

Id. at 211 (quoting *Shannon v. United States Dept. of Housing & Urban Dev.*, 436 F.2d 809, 818 (3d Cir. 1970).

Based upon all of these considerations, the Court held that

> [w]e can give vitality to [the Fair Housing Act] only by a generous construction which gives standing to sue to all in the same housing unit who are injured by racial discrimination in the management of those facilities within the coverage of the statute.

Id. at 212. In other words, persons having suffered indirect injury as a result of illegal housing discrimination have standing under the Fair Housing Act to seek redress of such harm.

B. The *Gladstone, Realtors* Decision

The Court next addressed the issue of standing under the Fair Housing Act in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979). That case involved a group of homeowners, as well as a municipality, which brought claims under the Fair

Housing Act to stop racial "steering" practices, whereby minority home buyers were shown homes only in certain areas. The homeowners claimed that as a result of these steering practices, the housing market in their town had been "wrongfully and illegally manipulated to [their] economic and social detriment . . . ." *Id.* at 95. The defendants argued that the plaintiff homeowners had no standing to sue because they had suffered only indirect injury. However, relying on *Trafficante*, this Court rejected that argument and upheld the homeowners' standing. *Id.* at 109-11.

In so holding, the Court emphasized the economic realities that underlie widespread patterns of housing discrimination:

> The adverse consequences attendant upon a "changing" neighborhood can be profound. If petitioners' steering practices significantly reduce the total number of buyers in the Bellwood housing market, prices may be deflected downward. This phenomenon would be exacerbated if perceptible increases in the minority population directly attributable to racial steering precipitate an exodus of white residents.

Id. at 110 (citing *Zuch v. Hussey*, 394 F. Supp. 1028, 1030, 1054 (E.D. Mich. 1975), *aff'd*, 547 F.2d 1168 (6th Cir. 1977); *Barrick Realty, Inc. v. City of Gary*, 354 F. Supp. 126, 135 (N.D. Ind. 1973), *aff'd*, 491 F.2d 161 (7th Cir. 1974); *United States v. Mitchell*, 335 F. Supp. 1004, 1005 (N.D. Ga. 1971), *aff'd*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973)). Every person owning a home in the affected area could feel the effects of such a wide-ranging pattern of discrimination — "[t]he most obvious source of [economic] harm would be an absolute or relative diminution in value of the individual respondents' homes." *Id.* at 115.

For these reasons, the Court held that "evidence that the economic value of one's own home has declined as a result of another certainly is sufficient under Art. III to allow standing to contest the legality of that conduct." *Id.* The Court also reaffirmed that the Fair Housing Act is not limited to claims of direct injury:

> [A]s long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed. The central issue at this stage of the proceedings is not who possesses the legal rights protected by § 804, but whether respondents were genuinely injured by conduct that violates *someone's* § 804 rights. . . .

Id. at 103 n.9 (emphasis supplied). Thus, the Court allowed standing to every homeowner in the Village of Bellwood, which had an estimated population of 20,969. *See id.* at 114 n.27.

C. The *Havens* Decision

In *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), the Court yet again permitted indirect injury claims to be brought under the Fair Housing Act. The case, which involved claims of racial steering, was brought against a company that owned two apartment complexes in Richmond, Virginia. The plaintiffs claimed standing as residents of Richmond, who were damaged by any actions that tended to create segregated communities within that city.

This Court upheld the plaintiffs' standing to bring their claims. The Court once again reiterated that

> "Congress intended standing under § 812 to extend to the full limits of Art. III" and . . . the courts

> accordingly lack the authority to create prudential barriers to standing in suits brought under that section.

Id. at 372 (quoting *Gladstone, Realtors*, 441 U.S. at 103 n.9). Based upon this Congressional intent, the Court explicitly approved the concept of "neighborhood" standing, where "the injury asserted is an indirect one: an adverse impact on the neighborhood in which the plaintiff resides resulting from the steering of persons other than the plaintiff." *Id.* at 375; *see also id.* at 376 n.16 (" 'as long as the plaintiff suffers actual injury as a result of the defendant's conduct, he is permitted to prove that the rights of another were infringed' ").

II.

INTERVENTION IS NEEDED TO PRESERVE THE INTEGRITY OF THE COURT'S HOLDINGS IN *TRAFFICANTE, GLADSTONE, REALTORS* AND *HAVENS.*

Petitioners relied upon this Court's holdings in *Trafficante, Gladstone, Realtors* and *Havens* in drafting their pleadings. Following those cases, petitioners' Third Amended Complaint alleged that the defendant insurance companies, acting separately and together, have manipulated the market for homeowners insurance in such a way that persons owning property in minority neighborhoods in Missouri either cannot obtain coverage or can do so only on unfavorable terms. *See* Third Amended Complaint at ¶ 49-50 (App., *infra*, 45a-46a). Because insurance is a prerequisite for financing, such manipulation of the insurance market adversely affects the value of housing in these neighborhoods. As a result, petitioners alleged that they and the other homeowners in the affected areas have suffered both economic and non-economic injury at the hands of each defendant. *See id.* at ¶¶ 46, 50, 81, 84, 90 and 96

(economic loss alleged) (App., *infra*, 43a, 45a-46a, 51a, 52a, 53a, 54a); *id.* at ¶¶ 81, 85, 91 and 97 (non-economic loss alleged) (App., *infra*, 51a, 52a, 53a, 54a).

In particular, petitioners alleged that

> each plaintiff and class member has suffered common damages in the form of a relative and/or absolute diminution in the value of their properties. Each plaintiff and class member has suffered these damages, whether they have ever personally dealt with the defendants or not, and regardless of their own personal experiences with homeowners insurance.

Id. at ¶ 46 (App., *infra*, 43a).

These allegations were clearly sufficient to establish standing for petitioners under the Court's holdings in *Trafficante*, *Gladstone, Realtors* and *Havens*. As discussed above, the Court has recognized that "[t]he most obvious source" of economic injury to homeowners targeted for housing discrimination "would be an absolute or relative diminution in value" of their homes. *Gladstone, Realtors*, 441 U.S. at 115. Any discriminatory practice that "significantly reduce[s] the total number of buyers" in a housing market may deflect housing prices downward. *See id.* at 110. In such cases, "neighborhood" standing is appropriate, and all homeowners in the affected area may file an action to remedy such discriminatory practices. *See Havens*, 455 U.S. at 375.

Despite the conformance of petitioners' claims to this Court's previous holdings, the lower courts held that petitioners "lack standing to bring claims against defendants against whom they have alleged no direct injury," and therefore dismissed the claims (App., *infra*, 20a). This statement of law is clearly

wrong, and more importantly it threatens the authority of this Court by disregarding the Court's holdings in *Trafficante*, *Gladstone*, *Realtors* and *Havens*. The Court should exercise its supervisory powers, summarily vacate the lower court rulings, and remand this case for proceedings consistent with the Court's prior holdings.

III.

INTERVENTION IS NEEDED TO PRESERVE THE INTEGRITY OF THE FAIR HOUSING ACT.

As the Court emphasized in *Trafficante*, Congress has placed the primary responsibility for enforcing the Fair Housing Act into the hands of private plaintiffs, or "private attorneys general." *See Trafficante*, 409 U.S. at 210-11. The lower court rulings, if allowed to stand, would eviscerate this carefully constructed statutory scheme by removing a major group of potential enforcers — persons who have suffered indirect injury as a result of discrimination directed at other persons.

In many cases of housing discrimination, including the present case, *no* persons have direct dealings with a particular discriminating entity. This case, for example, involves some defendants who make extraordinary efforts to avoid all dealing with homeowners in minority neighborhoods. They maintain no offices in minority areas; they do not advertise; and they maintain underwriting rules designed to discourage any possible applications from minority areas. One defendant refused to sell any policies at all in the City of St. Louis. Another will not sell insurance policies to anyone whose home is not worth at least $200,000. In minority neighborhoods of Kansas City and St. Louis, few (if any) homes meet that criteria. Therefore no one living in those neighborhoods applies for that insurance.

In this case, more than 93,000 homeowners are affected by defendants' illegal discrimination. Yet, under the direct injury requirement adopted by the lower courts, the companies can argue that not one of these 93,000 homeowners has standing to seek redress of that discrimination. The companies can make that argument precisely because their discrimination has been so effective that no one owning property in the affected areas has been able to have direct dealings with those insurers. Congress cannot and did not intend to allow such a result. It is therefore of vital importance for this Court to exercise its supervisory power to vacate the lower courts' rulings in order to maintain the integrity of the Fair Housing Act, both in Missouri and throughout the country.

CONCLUSION

The lower court rulings in this case directly contradict the holdings of three opinions issued by this Court. Moreover, if the lower court rulings are allowed to stand, the entire enforcement mechanism of the Fair Housing Act will be threatened, and 93,000 victims of illegal housing discrimination will be left without a remedy.

The Court should therefore grant the petition for writ of certiorari, summarily vacate the lower court rulings, and remand this case for further proceedings consistent with the Court's rulings in *Trafficante*, *Gladstone, Realtors* and *Havens*.

Respectfully submitted,

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC DATED AUGUST 7, 1998

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3075WMKC

Cynthia E. Canady, et al,

Appellants,

v.

Allstate Insurance Company, et al,

Appellees.

Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

August 7, 1998

Order Entered at the Direction of the Court:

s/ Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 6, 1998

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 97-3075

Cynthia E. Canady; Marva Jean Saunders, individually and representing a class of similarly situated persons,

Plaintiffs - Appellants,

Coleman McClain, et al.,

Intervenor Plaintiffs - Appellants,

v.

Allstate Insurance Company, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Western District of Missouri.

[UNPUBLISHED]

Submitted: February 9, 1998
Filed: July 6, 1998

Before McMILLIAN, WOLLMAN, and LOKEN, Circuit Judges.

Appendix B

PER CURIAM.

Named plaintiffs and others commenced this purported class action alleging that defendant insurance companies conspired to and did refuse to sell homeowners' insurance on equal terms to residents of predominantly minority neighborhoods in St. Louis and Kansas City, Missouri, thereby violating 42 U.S.C. §§ 1981, 1982, and 1985(3); the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.*; and Missouri common law. The district court,[1] initially dismissed plaintiffs' § 1985(3) and common law conspiracy claims because the Complaint failed to allege facts suggesting "a meeting of the minds" among the insurers. After several months of discovery, the court ruled that, absent a viable claim of conspiracy, plaintiffs lack standing to sue defendants with whom they had no contact. The court denied plaintiffs' motion for class certification, concluding the proposed class — "all persons who have owned a home located in a zip code in the State of Missouri whose minority population was 50% or greater according to the 1990 Census" — was overbroad and did not meet Fed. R. Civ. P. 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of class representatives because of the standing deficiencies. The court then dismissed the Complaint without prejudice.

On appeal, plaintiffs argue the district court erred in dismissing their various conspiracy claims, in ruling that they lack standing, and in denying their motion for class certification. We review the court's refusal to certify a class for abuse of discretion. *See Coleman v. Watt*, 40 F.3d 255, 259 (8th Cir. 1994). After careful review of the record, we affirm for the reasons stated in the district court's thorough opinions. *See* 8th

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1. The HONORABLE FERNANDO J. GAITAN, JR., United States District Judge for the Western District of Missouri.

Appendix B

Cir. R. 47B. Plaintiffs also seek leave to supplement their original conspiracy pleadings. However, plaintiffs did not give the district court all opportunity to consider this issue nor explain on appeal how they would amend to save their claims. *See Batra v. Board of Regents*, 79 F.3d 717, 722 (8th Cir. 1996).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED JUNE 19, 1997

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Case No. 96-0174-CV-W-2

Cynthia E. Canady, et al.,

Plaintiffs,

v.

Allstate Insurance Co., et al.,

Defendants.

ORDER

Pending before the Court are plaintiffs' motion for class certification and plaintiffs' renewed motion to maintain this action as a class action.[1] In this insurance redlining action, plaintiffs claim violations of the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981 and 1982, and of the Fair Housing Act 42 U.S.C. 3601 *et seq*. *See* Third Amended Class Action Complaint. After three months of discovery pertaining to the class certification issue, plaintiffs renew their motion to maintain this action as a class action.

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1. Also pending are defendant Allstate Insurance Company's motion to sever and defendant Liberty Mutual Insurance Company's motion for partial summary judgment. See section IV of this order for the dispositions of these motions.

Appendix C

I. CLASS CERTIFICATION PREREQUISITES

The principal purpose of class certification is to conserve the resources of both the court and the parties by permitting an issue potentially affecting every class member to be litigated in an economical manner. *See General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 155 (1982). However, the implementation of a class action is an exception, rather than the general rule. *Id.* Plaintiffs bear the burden of proving that each of the requirements of class certification has been met. *Id.* at 162; *Trotter v. Klincar*, 748 F.2d 1177, 1184 (7th Cir. 1984).

In deciding whether to certify a class, the court is to make no determinations as to the merits of the case. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 178 (1974). Instead of an inquiry into the merits, the focus is on whether the requirements of Rule 23 have been met. *See Doctor v. Seaboard Coast Line Ry. Co.*, 540 F.2d 699, 707 (4th Cir. 1976); *see also Blackie v. Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975) ("While the court may not put the plaintiff to preliminary proof of his claim, [the court] does require sufficient information to form a reasonable judgment. Lacking that, the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements."), *cert. denied*, 429 U.S. 816 (1976).

In order to qualify for certification, a potential class must meet all four prerequisites of Fed.R.Civ.P 23(a) and one of three Rule 23(b) requirements. The preliminary requirements for class certification under Fed.R.Civ.P 23(a) are: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims

or defenses of the class representatives are typical of the claims or defenses of other class members; and (4) the class members are able to protect the interest of the class fairly and adequately.

Unless all four requirements of Rule 23(a) are met, no class can be certified. Only if and when the court determines that these are all satisfied will the court need to determine whether one of the three prerequisite of Rule 23(b) has been met. Plaintiffs have expressed, in their motion for class certification, a desire for a bifurcated class action: a class certified under 23(b)(2) for the "liability phase" seeking injunctive relief and subsequently, if liability is found, a class (or classes) certified under 23(b)(3) for the "damage phase." *See* Plaintiffs' Amended Motion, p. 2.

Rule 23(b)(2) certification is warranted when injunctive relief is the primary relief sought, although monetary damages may also be recovered. The text of Rule 23(b)(2) provides for a class when:

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.

Id.

On the other hand, Rule 23(b)(3) certification is warranted when the potential class shares common issues of law or fact and such common issues will predominate in the lawsuit. Rule 23(b)(3) requires the court to find that "a class action is superior to the other methods for the fair and efficient adjudication of

the controversy." *Id.* In deciding whether a class action would be the "superior" manner in which to proceed, the court must consider:

> (A) the interest of members of the class in individually controlling the prosecution or defends of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Id.

II. ANALYSIS

Preliminarily, the court should examine the proposed class definition. Plaintiffs in this case seek to certify two classes: one for their Civil Rights claims and one for the Fair Housing Act claim. The only difference between these proposed classes is caused by the differing statutes of limitations applicable to the acts. The proposed class for the Civil Rights Acts claims is comprised of: "All persons who, at any time between February 14, 1991 and the date of trial, have owned a home located in a minority neighborhood in the State of Missouri." The proposed class for the Fair Housing Act claim is comprised of: "All persons who, at any time between February 14, 1994 and the date of trial, have owned a home located in a minority neighborhood in the State of Missouri." *See* Plaintiff's Motion p. 3.

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Plaintiffs' definition of "neighborhood" is overbroad. By plaintiffs' calculus, a neighborhood is defined by zip code boundaries. However, especially in urban areas, several distinct neighborhoods are often lumped together in one zip code. Historic homes and expensive neighborhoods are sometimes included the same minority zip codes as contain less economically desirable neighborhoods. For this and other reasons, some of the distinct neighborhoods within particular minority zip codes are not comprised primarily of minority-owned homes.

Plaintiffs make the bold assertion that they

> have . . . produced evidence showing that defendants' redlining practices have caused damage to every person owning a home in the affected minority neighborhoods, regardless of each person's individual experiences or ability to obtain insurance.

Plaintiffs' reply, p. 2. However, plaintiffs have actually not so proven. A class comprised of every predominantly minority zip code in Kansas City and St. Louis, Missouri, numbering at least 93,000 persons is not the "relatively compact neighborhood" envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979) and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact. *See South Suburban Housing Center v. Santefort Real Estate*, 658 F.Supp. 1450, 1456-57 (N.D.Ill. 1987). Because the court cannot accept plaintiffs' blanket contention that every member of the proposed broad class definition has allegedly suffered harm as a result of the defendants' wrongdoing, the court must find that the class definition is overbroad. *Midpeninsula Citizens*

for Fair Housing v. Acco Management Co., 168 F.R.D. 647, 649 (N.D.Ca. 1996).

Given that if the other requirements of Rule 23 were met, an amended class definition could be presented to the court, the court will still proceed to address the Rule 23(a) requirements.

1. Numerosity

To satisfy the numerosity requirement of Rule 23(a)(1), plaintiffs "must show only that joinder is impracticable through 'some evidence or reasonable estimate of the number of purported class members.' " *Linquist v. Bowen*, 633 F.Supp. 846, 858 (W.D.Mo. 1986) (quoting *Zeidman v. J. Ray McDermott & Co., Inc.*, 651 F.2d 1030, 1038 (5th Cir. 1981). "Impracticability does not mean impossibility, but only that the joinder of all members of the class would be difficult or inconvenient." *Jackson v. Rapps*, 132 F.R.D. 226, 230 (W.D.Mo. 1990).

Plaintiffs claim that the two proposed classes consist of at least 93,000 members. This figure was adopted from the United States Census Data. It allegedly represents the number of homeowners in the predominantly (defined as over fifty-percent) minority zip codes in St. Louis and Kansas City, Missouri. Generally when classes numbering in the hundreds or thousands have been proposed, "the impracticablilty of bringing all class members before the court has been obvious, and the Rule 23(a)(1) requirement has been easily met." 1 H. Newberg & A. Conte, *Newberg on Class Actions*, §§ 3.05 at 3-24 (3d ed. 1992). However, for the reasons discussed *infra* with regard to the typicality and commonality requirements,

joinder would not be impracticable in this case. Thus, the court finds that the numerosity requirement has not been met.

2. Commonality

Plaintiffs correctly cite the standard for analyzing the Rule 23(a)(2) criteria — only *one* common issue of law or fact must exist to satisfy the commonality requirement. Plaintiffs purport to identify several issues of fact and law which are common to the proposed plaintiff class. According to plaintiffs, commonality of factual issues include (1) statistical evidence of the dual market for homeowners insurance, (2) defendants' underwriting guidelines that affect the availability of homeowners insurance in minority neighborhoods, (3) minimum value requirements, (4) requirements regarding the relationship between market value and replacement cost (denying insurance to individuals when the relationship of the market value to the replacement cost exceeds a specific amount), (5) maximum age of dwelling requirements which allegedly exclude a substantially higher proportion of property in minority neighborhoods than in white neighborhoods, (6) use of credit reports which allegedly have a disproportionate impact on persons owning homes in minority neighborhoods and may be a surrogate for other prohibited factors such as race, (7) use of subjective terms such as "pride of ownership," "good morals," or "defect in character" relating to maintenance and personal characteristics of applicants, (8) defendants' pricing policies with respect to minority neighborhoods, (9) the effect of defendants' discriminatory practices on persons owning homes in minority neighborhoods and (10) the defenses that will be asserted by defendants to explain the dual market for homeowners insurance. The questions of law which plaintiffs allege to be common are plaintiffs' claims of disparate impact and disparate treatment.

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Notwithstanding plaintiffs' attempt to make a showing of commonality, the requirement of Rule 23(a)(2) is not met. Commonality exists only when the plaintiffs have allegedly been aggrieved by a single defendant or by several defendants acting in concert. *La Mer v. H&B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973)(where plaintiff was injured by one pawnbroker and attempted to file class action against all pawnbrokers in state, class certification inappropriate). Plaintiffs cite no cases in which class certification was granted in a similar case where multiple unrelated defendants existed. For its proposition that "because of the inherent class-based nature of redlining claims, courts considering the issue of insurance redlining have granted class certification," plaintiffs cite *NAACP v. American Family Mutual Ins. Co.*, Civil No. 90-C-0759, Stipulation and Order (E.D. Wis. 1992) and *Toledo Fair Housing Center v. Nationwide Mut. Ins. Co.*, Case No. 93-1685, Opinion and Judgment Entry (Ct. C.P. Lucas County, Ohio, Jan 17, 1996). Plaintiffs' Suggestions, p. 2. However, neither case addresses the issue of multiple defendants in the class certification scheme. In *American Family*, only one defendant was sued and certification was ordered through a stipulation of the parties. In *Toledo Fair Housing Center*, a plaintiff class was certified against defendants Nationwide Mutual Insurance Company and Nationwide Mutual Fire Insurance Company, defendants that were related through ownership by the same parent company.

Plaintiffs have not presented the court with any cases in which a plaintiff class was certified against an unrelated group of defendants in an insurance redlining case, nor is the court aware of any type of case in which a class action has been allowed to proceed against multiple unrelated defendants, absent a claim for conspiracy or evidence of joint action. Rather,

courts require some relationship between the defendants that stronger than simply engaging in the same business or being members of the same industry.

In *Hiatt v. County of Adams, Ohio*, 155 F.R.D 605, 608 (S.D.Ohio 1994) the court found that commonality existed with respect to prisoners challenging jail conditions because " 'the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation.' " *Id.* (quoting *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D.Ohio 1976).

In Central Wesleyan College, et al v. W.R. Grace & Co., et al, 143 F.R.D. 628 (D.S.C. 1992), a case involving asbestos, defendants insisted, just as the defendants in this case insist, that not all defendants have had contacts with all of the plaintiffs. That case was different than the present case in one principle regard: a conspiracy claim had been sufficiently alleged. Because of the existence of the conspiracy claim, the court conditionally certified the class. *Id*, at 636-37.

A well-supported conspiracy allegation prompted yet another district court to certify a class of plaintiffs in a securities fraud action against several defendants. *CV Reit, Inc. v. Levy*, 644 F.R.D. 690, 696 (S.D.Fla. 1992):

> The commonality requirement is satisfied where questions of law refer to standardized conduct by defendants toward members of the proposed class. . . . Factual distinctions that may exist are "far less important than the common issues bearing on the existence of a 'common scheme' of misrepresentations and omissions". *Id.* at 59. The

> gravamen of the Plaintiffs' complaint is that the Defendants engaged in a common course of conduct to conceal the true financial condition and business prospects of CV Reit, including the condition of the mortgage portfolio.

Id.

In re Computer Memories Securities Litigation is an example of a decision where a court found a juridical link even though the plaintiff class representative did not have claims against all the defendants. 1111 F.R.D. 675 (N.D.Ca. 1986). There, defendant underwriters were found to be juridically linked because the defendants entered into an agreement among themselves concerning the relevant underwriting and were thereby bound to a common course of conduct.

Although plaintiffs have alleged that some of the defendants in this case have adopted the underwriting guidelines of other defendant insurance companies, rather than creating their own, no agreement has been alleged binding the defendants to use particular underwriting guidelines or binding them to any other specific course of conduct. No independent legal relationship between defendants has been alleged which, if it existed, would justify class certification of plaintiffs' proposed class.

Angel Music, Inc. v. ABC Sports, Inc. is more analogous to the present case. 112 F.R.D. 70 (S.D.N.Y 1986). In that copyright infringement action, the court plaintiffs argued that members of the defendant class had engaged in a common violation of the Copyright Act. The Court rejected plaintiffs' argument that by engaging in a common violation, the

defendants actions were within the juridicial link exception to *La Mar*. Similarly, the Canady plaintiffs' assertion that Missouri insurance companies have redlined, even if true, cannot compel a class action where plaintiffs have no claims that they have been aggrieved by all defendants singularly or jointly.

Where different members of the proposed plaintiff class have allegedly suffered due to the illegality of one or more — but less than all — of the defendants, certification is not proper against such a class of unrelated defendants unless the complaint includes a count for conspiracy or joint action (such as a joint tort). 1 Newberg § 3.18. For this reason, the court cannot agree with plaintiffs' statement that

> [t]he experiences of an individual property owner in attempting to purchase insurance from a particular company are irrelevant to this analysis, because the damage is caused by the cumulative effect of defendants' policies on all persons owning homes within the affected neighborhoods.

Plaintiffs' suggestions, p. 27. No where in plaintiffs' complaint is concert of action or conspiracy alleged. Absent such an allegation, no class may be maintained against the defendants.

3. Typicality

Because the commonality requirement is not met, it logically follows that plaintiffs cannot meet the typicality requirement of Rule 23(a)(3) "Commonality and typicality are closely related and a finding of one generally compels a finding of the other." *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 333 n. 13 (N.D.Ill. 1995)(citing 1 Newberg

§ 3.13). The typicality prerequisite requires a finding by the court that the claims or defenses of the class representatives are typical of the claims or defenses of the class. A finding of typicality will only follow if first the class members claims are, in fact, common; when the interests of the class members are not common, it is impossible that the interests of the named class members would be typical of those of the class.

The Ninth Circuit has stated the general rule as follows: "typicality is lacking when the representative plaintiffs' cause of action is against a defendant unrelated to the defendants against whom the cause of action of the members of the class lies." *La Mar*, 489 F.2d at 465. However, the court cited the following exception:

> [T]his position does not embrace situations in which all injuries are the result of a conspiracy or concerted schemes between the defendants at whose hands the class suffered injury. Nor is it intended to apply in instances in which all defendants are juridically related in a manner that suggests a single resolution of the dispute would be expeditious.

Id. at 466.

No juridical link can be said to exist between unrelated businesses simply because they engage in similar conduct. *Id.* at 470. A juridical link sufficient to justify class certification

> generally must stem from an independent legal relationship. Partnership, joint enterprise, control, conspiracy, and aiding and abetting all may serve as such a link, since they denote some form of

> activity or association on the part of the defendants that warrants imposition of joint liability against the group even though the plaintiff may have dealt primarily with a single member.

Akerman v. Oryx Communications, Inc., 609 F.Supp. 363, 375 (S.D.N.Y. 1984), *aff'd in pertinent part*, 810 F.2d 336 (2nd Cir.1987).

However, plaintiffs assert that typicality exists because "the named plaintiffs' interests are identical to, and their claims typical of, the interests and claims of the class members they seek to represent." Plaintiffs' Suggestions, p. 36. Essentially, the class representatives' claim will only be typical of the claims of the class if their claim and those of the class "arise from the same event or pattern or practice and are based on the same legal theory." *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1337 (11th Cir. 1984) *cert. denied*, 470 U.S. 1004 (1985). The events giving rise to the claims in this case are separate and distinct: each plaintiff's claim against one or several defendants is distinct; no pattern or practice has been sufficiently alleged. Hence, where there is no commonality, no typicality can be said to exist.

4. Adequacy of Class Representative

The focus of Rule 23(a)(4) is whether: (1) the class representatives have common interests with the members of the class; and (2) whether the class representatives will vigorously prosecute the interests of the class through qualified counsel." *Paxton v. Union National Bank*, 688 F.2d 552, 562-63 (8th Cir. 1982). "The appropriate test for determining whether the interests of the class representatives and other members of

the class are antagonistic is whether or not those interests may be deemed coextensive; a total identity of interests is not required." *In re Tetracycline Cases*, 107 F.R.D. 719, 730, (W.D.Mo. 1985). " 'Coextensiveness' has been defined to mean that the plaintiffs and the class representatives 'share common objectives and legal or factual positions.' " *Id.*

The court will not reach the issue of vigorous prosecution through qualified counsel because the first prong of the requirement is not met: the class members do not have interests common to the class. "If the plaintiffs fail to satisfy the typicality test, the plaintiffs will also not be adequate representatives[.]" 1 Newberg § 3.13. A class action is inappropriate when the named plaintiffs are attempting to "represent those having causes of action against other defendants against whom the plaintiff has no cause of action and from whose hands [they] suffered no injury." *La Mar*, 489 F.2d at 462.

5. Rule 23(a) Conclusion

Because the requirements of 23(a), Fed.R.Civ.P., have not been met, plaintiffs' proposed class cannot be certified. It is not necessary, therefore, to consider whether the additional requirement of 23(b) is met.

III. STANDING

In the early stage of this litigation, the court denied defendants' motion to dismiss on standing grounds, recognizing that an indirect injury is often sufficient to establish standing to sue if the injury is fairly traceable to the conduct of the defendants. Order dated October 10, 1996, p.4. When ruling a

motion to dismiss, the court must grant every reasonable inference to the plaintiffs. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Dismissal of plaintiffs' case on standing grounds would have been premature at that stage because the class was not well-defined and class discovery had not yet taken place.

As litigation progresses, however, and the facts and basis of the litigation become apparent, reasonable inferences are no longer afforded and plaintiffs allegations must clearly indicate that standing is proper. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Although standing and class certification are separate and distinct issues, an unfavorable analysis by the court of the class certification issue, especially with regard to the typicality requirement of Rule 23(a)(3), often makes evident that standing is also lacking. 1 Newberg § 3.18. Scrutiny of the proposed class definition as well as the 23(a) factors leads the court to conclude that plaintiffs do not have standing to bring suit, as a group, against individual, unrelated insurance companies when no proposed representative plaintiff has alleged to have been aggrieved by all defendants, nor has any claim of joint action or conspiracy been brought by the complaint.

The court adopts the Ninth Circuit's reasoning in *La Mer:* While a plaintiff would have standing to represent a class of similarly situated persons who had allegedly suffered injury by the same defendant, that plaintiff would not, in the absence of an alleged conspiracy, have standing to represent a class of all persons similarly situated who have allegedly suffered injury at the hands of different defendants even if those defendants are members of the same industry and the legal violation is allegedly widespread. 489 F.2d at 464-65.

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Because plaintiffs lack standing to bring claims against defendants against whom they have alleged no direct injury, the Third Amended Class Action Complaint must be dismissed. However, dismissal is without prejudice; each plaintiff who chooses to do so may refile against the defendant or defendants with whom each plaintiff has alleged grievances. If plaintiffs, individually or jointly pursuing their causes of action against defendants, discover facts supporting a claim of conspiracy, they could seek to alter the course of the litigation at that time. *See Taliaferro v. State Council of Higher Education*, 372 F.Supp. 1378 (E.D.Va. 1974), *modified on reconsideration*, 388 F.Supp. 957 (E.D.Va. 1975).

IV. ORDER

Accordingly, it is hereby **ORDERED** that:

(1) plaintiffs' motion for class certification and plaintiffs' renewed motion to maintain this action as a class action is **DENIED;**

(2) defendant Allstate Insurance Company's motion to sever is dismissed as moot;

(3) defendant Liberty Mutual Insurance Company's motion for partial summary judgment is dismissed as moot; and

(4) this action is dismissed without prejudice for plaintiffs' failure to meet standing requirements.

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s/ Fernando J. Gaitan, Jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: JUN 19 1997
Kansas City, Missouri

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION FILED OCTOBER 10, 1996

IN THE UNITED STATES DISTRICT COURT WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

Case No. 96-0174-CV-W-2

Cynthia Canady, et al.,

Plaintiffs,

vs.

Allstate Insurance Co., et al.,

Defendants.

ORDER

Pending before the Court are defendants' motions to dismiss plaintiffs' amended complaint on standing grounds.[1]

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1. Several defendants have additionally requested in their motions that certain named plaintiffs be dismissed as to that specific defendant for failure to comply with Fed. R. Civ. P. 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* Defendants contend the plaintiffs they name in their motions fail to comply with Rule 8(a) because their amended complaint does not state that the named plaintiffs were injured by the motioning defendant specifically. The Court has reviewed these arguments and is not persuaded the result warranted by this argument is different than the (Cont'd)

Defendants allege that plaintiffs fail to meet the requirements of standing with regard to the individual motioning defendants. Defendants suggest that because certain plaintiffs have not held or attempted to obtain insurance policies from the particular motioning defendants, those plaintiffs fail to state a claim against those defendants.[2]

I. GENERAL STANDING REQUIREMENTS

The U.S. Supreme Court has clearly defined the standing requirements under Article III. The concept of standing is necessary to ensure that federal courts only become involved in disputes if plaintiff has made out a "case or controversy" within the meaning of Article III. Standing requires that the "plaintiff himself has suffered "some threatened or actual injury resulting from the putatively illegal action." *Warth v. Seldin*,

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(Cont'd)
decision expressed in this Order. The Court is especially persuaded to reach this result by U.S. Supreme Court precedent, which states that the injury alleged need not be direct. Indirect injury provides a basis for the complaint so long as it is "fairly traceable to the defendants' acts or omissions." *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 261 (1977). Hence, these motions to dismiss individual plaintiffs pursuant to Fed. R. Civ. P. 8(a)(2) are ruled entirely by this Order although not discussed individually in the main text.

2. Most of the defendants have chosen to present their arguments by joining the Supplemental Suggestions submitted by Shelter Mutual Insurance Company and Shelter General Insurance Company. Those defendants who have instead submitted their own suggestions, however, (e.g., American Family Mutual Insurance Co., Truck Insurance Exchange, Mutual Insurance Co., Prudential Property and Casualty Insurance) espouse similar arguments and case law.

422 U.S. 490, 498 (1975) (citations omitted). "[A] litigant normally must assert an injury that is peculiar to himself or a distinct group of which he is a part, rather than one 'shared in substantially equal measure by all or a large class of citizens.' " *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979), *citing Warth*, 422 U.S. at 499. In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court elaborated on the requirements of standing:

> The essence of the standing question, in its constitutional dimension, is "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' (as) to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." (Citations omitted). The plaintiff must show that he himself is injured by the challenged action of the defendant. The injury may be indirect, *see United States v. SCRAP*, 412 U.S. 669, 688 (1973), but the complaint must indicate that the injury is indeed fairly traceable to the defendant's acts or omissions. (Citations omitted).

429 U.S. 252, 261 (1977). The Court further stated that "[i]t has long been clear that economic injury is not the only kind of injury that can support a plaintiff's standing." *Id.* at 562 (Citations omitted).

From the outset, it can be said that plaintiffs meet the burden of showing an injury fairly traceable to the defendants' acts or omissions. Plaintiffs have alleged that the defendant insurance companies, acting separately and in the aggregate, have effectively manipulated the market for homeowners

insurance in such a way that persons living in or desiring to live in minority neighborhoods in Missouri either cannot obtain coverage or can do so only on unfavorable terms. *See* Plaintiffs' First Amended Complaint (hereinafter, "Amended Complaint") at ¶¶ 44-45 ("Defendants' illegal underwriting and sales practices have resulted in a widespread unavailability of homeowners insurance in the Neighborhoods. Low-income neighborhoods that have predominantly white residents do not suffer from similar unavailability.") Plaintiffs have alleged that they have suffered both economic and non-economic injury as a result of this wrongful conduct. *See* Amended Complaint ¶¶ 72, 78, 84 ("As a result of Defendants' illegal discrimination, Plaintiffs and the members of the Class have suffered economic losses, including but not limited to excess premiums paid to Defendants."); ¶¶ 73, 79, 85 ("As a further result of Defendants' illegal discrimination, Plaintiffs and the members of the Class have suffered a loss of self esteem, humiliation, emotional distress and mental anguish.")

To defendants assertion that plaintiffs cannot bring their actions against defendants with whom they have had no direct dealings, plaintiffs cite *Fair Housing Council of Bergen County Inc. v. Eastern Bergen County Multiple Listing Service, Inc.*, a case in which plaintiffs were allowed to assert claims against "the entire real estate industry in Bergen." 422 F. Supp. 1071, 1074 (D.N.J. 1976). Plaintiffs maintain that "if all market actors contribute to the harm, then all may be joined to achieve a remedy." Plaintiffs' Suggestions, p. 9. The Court agrees with plaintiffs' contention and reminds defendants that the alleged injury need not be direct because indirect injury provides a basis for standing so long as it is fairly traceable to the defendants' acts or omissions. *Arlington Heights*, 429 U.S. at 261. This Court finds each plaintiff need not have instigated contact with

every named defendant in order to have been injured by that defendant.

II. STANDING WITH REGARD TO EACH INDIVIDUAL CLAIM

Having proven they meet the threshold requirements for standing, plaintiffs are now required to prove they meet the standing requirements for each claim they assert. Defendants' challenge plaintiffs' standing to bring conspiracy claims, claims under the Civil Rights Acts, and FHA claims. It is unnecessary to consider whether plaintiffs have standing to sue under § 1985(3) or civil conspiracy because this Court has previously ruled that they have failed to allege a conspiracy. *See* Order of this Court, October 2, 1996.

A. STANDING TO BRING CLAIMS UNDER THE CIVIL RIGHTS ACTS

To bring their cause of action under the Civil Rights Acts, plaintiffs must not only meet the standing requirements discussed above, e.g., that they suffered some injury in fact and have a personal stake in the outcome of the litigation, but must also satisfy "prudential" considerations. Prudential considerations are those used by courts to determine whether sound judgment dictates resolution of the dispute, keeping in mind the parameters of Article III.

In *Mackey v. Nationwide Insurance Co.*, a case where a black insurance agent attempted to challenge defendant insurance companies for alleged discriminatory insurance redlining practices,

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> [t]he plaintiff's alleged loss of commission income probably satisfies the constitutional requirement that a plaintiff have suffered some injury in fact and have a "personal stake" in the outcome of the litigation. This does not end the matter, however, for there are prudential limitations which enter into the equation in solving most problems of standing. Generally, a litigant is not permitted to assert the legal rights of others. The courts should not be called upon to decide questions of broad social import in cases in which no individual rights will be vindicated, and access to the federal courts should be limited to those litigants best suited to assert the claims. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979). The persons best suited to challenge the redlining practice are those owners of homes and buildings who have been the direct victims of the alleged discriminatory practice.

724 F.2d 419, 421-422 (4th Cir. 1984). The plaintiff in *Mackey* was found not to have standing because as an insurance agent he was not directly affected by the alleged redlining practices and therefore he was not best suited to bring those claims. Plaintiffs in this case, however, *are* those who are the most directly affected, economically and non-economically, by the alleged redlining practices of all named defendants. Furthermore, there are no persons better suited to make such challenges, according to *Mackey*, than the homeowners who have been victims of such discriminatory practices. *Id.* Hence, we find that the plaintiffs in this case survive scrutiny, both under the general standing principles and the prudential considerations, for standing to bring Civil Rights Acts claims.

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B. STANDING TO BRING CLAIMS UNDER THE FAIR HOUSING ACT

The plaintiffs' burden of proving standing to bring claims under the Fair Housing Act (hereinafter, the "FHA") is less onerous than its burden of proving standing to bring Civil Rights Acts claims. Courts have said prudential considerations do not weigh in the analysis of standing under the FHA. "The normal prudential barriers to standing may not be set up as obstacles to the maintenance of actions under the Fair Housing Act." *Mackey*, 724 F.2d at 422-23 *citing Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1983). Rather, "the sole requirement for standing to sue under [the FHA] is the Art. III minima of injury in fact: that the plaintiff allege that as a result of the defendant's action he has suffered 'a distinct and palpable injury.' " *Havens*, 455 U.S. at 371, *citing Warth*, 422 U.S. at 501.

Demonstrative of this less stringent standard for standing under FHA claims is *N.A.A.C.P. v. American Family Mut. Ins, Co.*, 978 F.2d 278 (7th Cir. 1992). In that case, defendant

> insists that there is no case or controversy within the meaning of Article III because none of the plaintiffs has been unable to buy a house. This is strictly a constitutional argument, for the definition of "aggrieved person" in Title VIII, 42 U.S.C. § 3602(i), eliminates any prudential barriers to adjudication. *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 98-99 (1979); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Congress amended the statute in 1988 to authorize suit by anyone who "believes that [he] will be injured by a

> discriminatory housing practice that is about to occur", § 3602(i)(2), and unless this statute is unconstitutional several of the plaintiffs (and the NAACP itself, as an organization whose members include many black persons in the housing market) have standing.

American Family, 978 F.2d at 293.

In *Bellwood* and *Havens*, two decisions which considered standing issues with regard to FHA claims, the U.S. Supreme Court found plaintiffs to have standing by virtue of the area in which they lived. In *Bellwood*, the plaintiffs were "testers" who approached real estate brokerage firms pretended to be interested in buying a home in a certain area. The actual intent of the testers was not to purchase but rather to determine whether allegations that the firms engaged in racial "steering" were true. After plaintiffs satisfied themselves that racial steering was in fact occurring, they sued defendants alleging violations of the FHA. To the defendants' argument that plaintiffs lacked standing, the U.S. Supreme Court replied that plaintiffs had standing to assert FHA claims merely on the basis of their status as homeowners in the affected communities. *Bellwood,* 441 U.S. at 111-15. In *Havens*, also a case involving "testers, the Supreme Court held that the fact plaintiffs lived in the metropolitan area in question was enough to prove standing. *Havens*, 455 U.S. at 375-76.

The *Mackey* Court, which denied a black insurance agent standing under the Civil Rights Acts (discussed *supra*), decided that plaintiff *did*, however, have standing to challenge the alleged redlining practice under the Fair Housing Act. "The plaintiff has alleged an economic injury to himself, satisfying

the Article III requirement, and that is all that need be shown." *Mackey*, 724 F.2d at 423.

As previously discussed, the plaintiffs in this case have alleged both economic and non-economic injury in their Amended Complaint and they allege that they would not be injured in such a way but for the conduct of all defendants. "For purposes of ruling on a motion to dismiss for want of standing, both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth*, 422 U.S. at 501. Taking plaintiffs' complaint as true, then, it is conceivable that plaintiffs were each individually damaged by each defendants discriminatory redlining practices.

V. ORDER

Accordingly, it is **ORDERED** that defendants' motions to dismiss plaintiffs' amended complaint on standing grounds is **DENIED.**

This Order disposes of a motion entitled Separate Defendant Truck Insurance Exchange's Motion to Dismiss for Lack of Standing (filed May 16, 1996) in its entirety.

This Order disposes of the following Orders in their entirety, having been ruled in part by this Order and in part by this Court's Order dated October 2, 1996:

1) Motion of Defendants Federal Insurance Company, Pacific Indemnity Insurance Company, Sun Alliance USA Group, and Vigilant Insurance Company to Dismiss Plaintiffs' First Amended Complaint (filed May 6, 1996);

2) Motion of Defendant Prudential Property and Casualty Insurance to Dismiss (filed May 6, 1996);

3) Motion of Defendants Shelter Mutual Insurance. Co. and Shelter General Insurance Co. To Dismiss Plaintiffs' First Amended Complaint Pursuant to Rule 12(b) (filed May 6, 1996);

4) Motion of Defendants American Economy Insurance Company, American States Insurance Company, and American States Preferred Insurance Company to Dismiss Plaintiffs' First Amended Complaint for Failure to State a Claim and For Lack of Standing (filed May 6, 1996).

5) Motion to Dismiss Plaintiffs' First Amended Complaint of Separate Defendant Old Reliable Casualty Company (filed May 6, 1996);

6) Motion of Defendant Liberty Mutual Insurance Company to Dismiss the First Amended Class Action Complaint (filed May 6, 1996);

7) Motion of Defendant American Family Mutual Insurance Company to Dismiss Amended Complaint (filed May 6, 1996);

8) Farm Bureau Town and Country Insurance Company of Missouri's Separate Motion to Dismiss of Defendant Farm Bureau Town and Country Insurance Company of Missouri (filed May 6, 1996);

Appendix D

It is further ordered that because there are no further dispositive motions pending, the stay of discovery is lifted and the parties shall proceed with discovery.

s/ Fernando J. Gaitan, jr.
Fernando J. Gaitan, Jr.
United States District Judge

Dated: OCT 10 1996
Kansas City, Missouri

APPENDIX E — THIRD AMENDED CLASS ACTION COMPLAINT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI WESTERN DIVISION

No. 96-0174-CV-W-2

CYNTHIA E. CANADY, MARVA JEAN SAUNDERS, MISCHELLE A. GREER, JIMMY D. HUNT, TAMARA A. HUNT, KIM Y. NICKERSON, ESTHER E. MOTEN, KERRY L. BUTLER, NADINE FARRIS, CHARLES LOCKRIDGE, COLEMAN MCCLAIN, EVALIN MCCLAIN, JOHN HAMMONDS, ALMA HAMMONDS, SARA KENNER, and CLARENCE KENNER, individually and/or on behalf of other persons similarly situated,

Plaintiffs,

vs.

ALLSTATE INSURANCE COMPANY, AMERICAN ECONOMY INSURANCE COMPANY, AMERICAN FAMILY MUTUAL INSURANCE COMPANY, AMERICAN STATES INSURANCE COMPANY, AMERICAN STATES PREFERRED INSURANCE COMPANY, FARM BUREAU TOWN & COUNTRY INSURANCE COMPANY, FARMERS & MERCHANTS INSURANCE COMPANY, FARMERS INSURANCE EXCHANGE, FEDERAL INSURANCE COMPANY, FIRE INSURANCE EXCHANGE, LIBERTY MUTUAL INSURANCE COMPANY, MID-CENTURY INSURANCE COMPANY, OLD RELIABLE CASUALTY COMPANY, PACIFIC INDEMNITY INSURANCE COMPANY, PRUDENTIAL PROPERTY AND CASUALTY

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COMPANY, SAFECO INSURANCE COMPANY, SEA INSURANCE COMPANY OF AMERICA, SHELTER GENERAL INSURANCE COMPANY, SHELTER MUTUAL INSURANCE COMPANY, STATE FARM FIRE AND CASUALTY COMPANY, STATE FARM GENERAL INSURANCE COMPANY, SUN INSURANCE OFFICE OF AMERICA, INC., and VIGILANT INSURANCE COMPANY,

Defendants.

THIRD AMENDED CLASS ACTION COMPLAINT

Plaintiffs, individually and/or on behalf of other persons similarly situated, file this their Third Amended Class Action Complaint against Defendants. In support of their Complaint, Plaintiffs allege and state as follows:

JURISDICTION AND VENUE

1. The claims asserted herein arise under the Fair Housing Act (Title VIII of the Civil Rights Act of 1968) (as amended), 42 U.S.C. § 3601 *et seq.*, and the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981 and 1982. The Court has jurisdiction over this controversy pursuant to 28 U.S.C. §§ 1331 and 1343(a)(4), 42 U.S.C. § 3613(a)(1)(A), and 28 U.S.C. §§ 2201 and 2202.

2. The Court has jurisdiction over Defendants because the unlawful practices alleged in this Complaint were committed, in whole or in part, in Jackson County, Missouri, which lies within the Western District of Missouri. In addition, Defendants

each have minimum contacts with the Western District of Missouri and the State of Missouri.

3. Venue is proper in this Court pursuant to 28 U.S.C. § 1391, because a substantial part of the events or omissions giving rise to Plaintiffs' claims occurred in the Western District of Missouri, and because each Defendant resides within the Western District of Missouri.

PARTIES

4. Plaintiff and Representative Plaintiff Cynthia E. Canady is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

5. Plaintiff and Representative Plaintiff Marva Jean Saunders is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

6. Plaintiff and Representative Mischelle A. Greer is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

7. Plaintiff and Representative Plaintiff Jimmy D. Hunt is a black citizen of the United States, residing in the City of Raytown, Jackson County, Missouri.

8. Plaintiff and Representative Plaintiff Tamara A. Hunt is a black citizen of the United States, residing in the City of Raytown, Jackson County, Missouri.

9. Plaintiff and Representative Plaintiff Kim Y. Nickerson is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

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10. Plaintiff Esther E. Moten is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

11. Plaintiff and Representative Plaintiff Kerry L. Butler is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

12. Plaintiff Nadine Farris is a black citizen of the United States, residing in the City of Kansas City, Jackson County, Missouri.

13. Plaintiff and Representative Plaintiff Charles Lockridge is a black citizen of the United States, residing in the City of St. Louis, Missouri.

14. Plaintiff and Representative Plaintiff Coleman McClain is a black citizen of the United States, residing in the City of Kansas City, Missouri.

15. Plaintiff and Representative Plaintiff Evalin McClain is a black citizen of the United States, residing in the City of Kansas City, Missouri.

16. Plaintiff John Hammonds is a black citizen of the United States, residing in the City of Kansas City, Missouri.

17. Plaintiff and Representative Plaintiff Alma Hammonds is a black citizen of the United States, residing in the City of Kansas City, Missouri.

18. Plaintiff and Representative Plaintiff Sara Kenner is a black citizen of the United States, residing in the City of Kansas City, Missouri.

19. Plaintiff and Representative Plaintiff Clarence Kenner is a black citizen of the United States, residing in the City of Kansas City, Missouri.

20. Defendant Allstate Insurance Company ("Allstate") is a corporation organized under the laws of the State of Illinois. Allstate transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

21. Defendant American Economy Insurance Company ("American Economy") is a corporation organized under the laws of the State of Indiana. American Economy transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

22. Defendant American Family Mutual Insurance Company ("American Family") is a corporation organized under the laws of the State of Wisconsin. American Family transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

23. Defendant American States Insurance Company ("American States") is a corporation organized under the laws of the State of Indiana. American States transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

24. Defendant American States Preferred Insurance Company ("American States Preferred") is a corporation organized under the laws of the State of Indiana. American States Preferred transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

25. Defendant Farm Bureau Town & Country Insurance Company ("Farm Bureau") is a corporation organized under the laws of the State of Missouri. Farm Bureau transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

26. Defendant Farmers & Merchants Insurance Company ("Farmers & Merchants") is a corporation organized under the laws of the State of Oklahoma. Farmers & Merchants transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

27. Defendant Farmers Insurance Exchange ("Farmers Exchange") is a corporation organized under the laws of the State of California. Farmers Exchange transacts business within the State of Missouri, and in particular sells homeonwers insurance within the State of Missouri.

28. Defendant Federal Insurance Company ("Federal") is a corporation organized under the laws of the State of Indiana. Federal transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

29. Defendant Fire Insurance Exchange ("Fire Exchange") is a corporation organized under the laws of the State of California. Fire Exchange transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

30. Defendant Liberty Mutual Insurance Company ("Liberty Mutual") is a corporation organized under the laws of the State of Massachusetts. Liberty Mutual transacts business

within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

31. Defendant Mid-Century Insurance Company ("Mid-Century") is a corporation organized under the laws of the State of California. Mid-Century transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

32. Defendant Old Reliable Casualty Company ("Old Reliable") is a corporation organized under the laws of the State of Arizona. Old Reliable transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

33. Defendant Pacific Indemnity Insurance Company ("Pacific") is a corporation organized under the laws of the State of California. Pacific transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

34. Defendant Prudential Property and Casualty Insurance Company ("Prudential") is a corporation organized under the laws of the State of New Jersey. Prudential transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

35. Defendant Safeco Insurance Company of America ("Safeco") is a corporation organized under the laws of the State of Washington. Safeco transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

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36. Defendants Sea Insurance Company of America ("Sea") is a successor in interest to Sun Alliance USA Group. Sea transacts business within the State of Missouri, and in particular sells or sold homeowners insurance within the State of Missouri.

37. Defendant Shelter Mutual Insurance Company ("Shelter Mutual") is a corporation organized under the laws of the State of Missouri. Shelter Mutual transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

38. Defendant Shelter General Insurance Company ("Shelter General") is a corporation organized under the laws of the State of Missouri. Shelter General transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

39. Defendant State Farm Fire and Casualty Company ("State Farm Fire") is a corporation organized under the laws of the State of Illinois. State Farm Fire transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

40. Defendant State Farm General Insurance Company ("State Farm General") is a corporation organized under the laws of the State of Illinois. State Farm General transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

41. Defendant Sun Insurance Office of America, Inc. ("Sun") is a successor in interest to Sun Alliance USA Group. Sun transacts business within the State of Missouri, and in

particular sells or sold homeowners insurance within the State of Missouri.

42. Defendant Vigilant Insurance Company ("Vigilant") is a corporation organized under the laws of the State of New York. Vigilant transacts business within the State of Missouri, and in particular sells homeowners insurance within the State of Missouri.

CLASS ACTION ALLEGATIONS

43. Representative Plaintiffs bring this action pursuant to Fed. R. Civ. P. 23, on their behalf and on behalf of other persons similarly situated who have been damaged by Defendants' illegal insurance underwriting, pricing, marketing and sales practices. The Class includes all persons who have owned a home located in a zip code in the State of Missouri whose minority population was 50% or greater according to the 1990 Census ("Minority Neighborhoods").

44. This case is properly maintainable as a class action in that:

a. The Class for whose benefit this action is brought is so numerous that joinder of all members is impracticable. The total number of persons included in the Class is estimated to exceed 93,000.

b. The claims of Representative Plaintiffs are typical of those of the Class Members, in that Representative Plaintiffs and Class Members have sustained damages arising out of Defendants' course of conduct alleged herein, including Defendants'

violations of federal law. Representative Plaintiffs' individual experiences with Defendants present characteristic examples of the means by which Defendants discriminate against homeowners in Minority Neighborhoods.

c. Representative Plaintiffs will fairly and adequately protect the interests of the Class Members. Representative Plaintiffs know of no conflicts of interest between Class Members with regard to the issues raised in this case, and know of no interest that Class Members might have in controlling or maintaining separate actions. Representative Plaintiffs have retained counsel competent and experienced in class and civil rights litigation and intend to prosecute this action vigorously.

d. A class action is superior to other available methods for the fair and efficient adjudication of this matter.

45. Defendants have acted or refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

46. There are questions of law and fact common to the Class. The central questions of fact herein are whether Defendants have engaged in underwriting, pricing, marketing and sales practices that prevent persons who own a home located in a Minority Neighborhood from purchasing homeowners insurance on the same terms and conditions as others. In

addition, each plaintiff and class member has suffered common damages in the form of a relative and/or absolute diminution in the value of their properties. Each plaintiff and class member has suffered these damages, whether they have ever personally dealt with the defendants or not, and regardless of their own personal experiences with homeowners insurance. The central questions of law herein are whether defendants' practices violate the Fair Housing Act and the Civil Rights Acts of 1866 and 1870. These common questions of law and fact predominate over any questions that may be unique to any individual.

FACTS

47. At all relevant times, Plaintiffs owned homes located in minority neighborhoods in the State of Missouri. At all relevant times, Representative Plaintiffs and Class Members owned homes located in Minority Neighborhoods.

48. At all relevant times, Defendants, individually and/or collectively, have engaged in a wide variety of illegal underwriting, pricing, marketing and sales practices that prevent persons who own a home and/or apply for homeowners insurance for a home located in minority neighborhoods including the Minority Neighborhoods from purchasing homeowners insurance on the same terms and conditions as others. Examples of such illegal practices include, but are not limited to, the following:

a. developing and maintaining marketing programs that steer agents toward neighborhoods that are considered "desirable" and away from minority neighborhoods including the Minority Neighborhoods;

b. maintaining special underwriting and sales rules for homeowners, applicants for homeowners insurance and/or properties located in minority neighborhoods including the Minority Neighborhoods that are not generally applicable to others;

c. maintaining underwriting guidelines, policies and practices that mandate denial of homeowners insurance based upon the age of property;

d. maintaining underwriting guidelines, policies and practices that mandate denial of homeowners insurance for homes below a minimum property value;

e. failing to establish and maintain offices or agents within minority neighborhoods including the Minority Neighborhoods;

f. refusing to sell homeowners insurance within minority neighborhoods including the Minority Neighborhoods;

g. steering persons who own homes and/or apply for homeowners insurance for homes located in minority neighborhoods including the Minority Neighborhoods toward buying "limited" policies rather than standard or comprehensive homeowners policies;

h. maintaining underwriting guidelines and practices that use credit history to deny coverage;

i. maintaining underwriting guidelines and practices that deny coverage to homeowners whose coverage was terminated by another company;

j. targeting minority neighborhoods including the Minority Neighborhoods for the sale of "limited" policies at excessive rates in order to take financial advantage of the illegal actions of others;

k. discouraging applicants from minority neighborhoods including the Minority Neighborhoods who contact their agencies from applying for insurance;

l. charging higher rates in minority neighborhoods including the Minority Neighborhoods than in others; and

m. canceling or refusing to renew policies held by homeowners in minority neighborhoods including the Minority Neighborhoods under circumstances in which others would not be canceled or refused renewal.

49. Defendants' illegal underwriting, pricing, marketing and sales practices have resulted in a widespread unavailability of standard or comprehensive homeowners insurance in minority neighborhoods including the Minority Neighborhoods.

50. Defendants' illegal underwriting, pricing, marketing and sales practices have further resulted in higher premiums for homeowners insurance policies being charged to persons owning homes in minority neighborhoods including the

Minority Neighborhoods than for persons living in other areas. These higher rates are charged despite the fact that persons living in minority neighborhoods including the Minority Neighborhoods have lower average loss histories than do persons living in other areas.

51. During the relevant time period, Ms. Canady obtained homeowners insurance from Farm Bureau. Farm Bureau did not offer Ms. Canady the opportunity to purchase her policies on the same terms and conditions as others because her homes are located in Minority Neighborhoods.

52. Farm Bureau systematically canceled and/or non-renewed Ms. Canady's policies. Farm Bureau canceled her policies because her homes are located in Minority Neighborhoods.

53. Thereafter, Ms. Canady obtained homeowners insurance policies from American Family and Farmers. American Family and Farmers did not offer Ms. Canady the opportunity to purchase her policies on the same terms and conditions as others because her homes are located in Minority Neighborhoods.

54. During the relevant time period, Ms. Saunders attempted to obtain a homeowners insurance policy from certain of the Defendants, but was refused. These Defendants refused to offer her a policy because her home is located in a Minority Neighborhood.

55. Ms. Saunders eventually obtained a homeowners insurance policy from American Family. American Family did not offer Ms. Saunders the opportunity to purchase her policy

on the same terms and conditions as others because her home is located in a Minority Neighborhood.

56. American Family quickly canceled Ms. Saunders' policy. American Family canceled her policy because her home is located in a Minority Neighborhood.

57. Thereafter, Ms. Saunders again attempted to obtain a homeowners insurance policy from certain of the Defendants, but was refused. These Defendants refused to offer her a policy because her home is located in a Minority Neighborhood.

58. During the relevant time period, Ms. Greer obtained homeowners insurance from State Farm. State Farm did not offer Ms. Greer the opportunity to purchase her policy on the same terms and conditions as others because her home is located in a Minority Neighborhood.

59. State Farm non-renewed Ms. Greer's policy. State Farm refused to renew her policy because her home is located in a Minority Neighborhood.

60. Thereafter, Ms. Greer attempted to obtain a homeowners insurance policy from certain of the Defendants, but was refused. These Defendants refused to offer her a policy because her home is located in a Minority Neighborhood.

61. During the relevant time period, Mr. and Mrs. Hunt obtained a homeowners insurance policy from Allstate. Allstate did not offer Mr. and Mrs. Hunt the opportunity to purchase their policy on the same terms and conditions as others because their home is located in a Minority Neighborhood.

62. Allstate non-renewed Mr. and Mrs. Hunt's policy. Allstate refused to renew their policy because their home is located in a Minority Neighborhood.

63. Thereafter, Mr. and Mrs. Hunt attempted to obtain a homeowners insurance policy from certain of the Defendants, but were refused. These Defendants refused to offer them a policy because their home is located in a Minority Neighborhood.

64. During the relevant time period, Ms. Nickerson attempted to obtain a homeowners insurance policy from certain of the Defendants, but was refused. These Defendants refused to offer her a policy because her home is located in a Minority Neighborhood.

65. During the relevant period, Ms. Moten obtained a homeowners' policy from Farmers. Farmers did not offer Ms. Moten the opportunity to purchase her policy on the same terms and conditions as others because her home is located in a minority neighborhood.

66. During the relevant time period, Mr. Butler obtained homeowners insurance from American Family and Farmers. American Family and Farmers did not offer Mr. Butler the opportunity to purchase his policies on the same terms and conditions as others because his homes are located in Minority Neighborhoods.

67. At one time, American Family refused to renew Mr. Butler's policy unless he purchased additional insurance. American Family refused to renew his policy unless he purchased additional insurance because his home is located in a Minority Neighborhood.

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68. During the relevant time period, Ms. Farris attempted to obtain a homeowners insurance policy from certain of the Defendants, but was refused. These Defendants refused to offer her a policy because her home is located in a Minority Neighborhood.

69. During the relevant time period, Mr. Lockridge obtained homeowners insurance from Allstate. Allstate did not offer Mr. Lockridge the opportunity to purchase his policy on the same terms and conditions as others because his home is located in the Neighborhoods.

70. Allstate refused to renew Mr. Lockridge's policy. Allstate refused to renew his policy because his home is located in a Minority Neighborhood.

71. During the relevant time period, the Reverend and Mrs. McClain attempted to obtain a homeowners insurance policy from certain of the Defendants, but were refused. These Defendants refused to offer them a policy because their home is located in a Minority Neighborhood.

72. The Reverend and Mrs. McClain eventually obtained a homeowners insurance policy from American Family. American Family did not offer the Reverend and Mrs. McClain the opportunity to purchase their policy on the same terms and conditions as others because their home is located in a Minority Neighborhood.

73. During the relevant time period, Mr. and Mrs. Hammonds obtained homeowners insurance from Prudential. Prudential did not offer Mr. and Mrs. Hammonds the opportunity to purchase their policy on the same terms and

conditions as others because their home is located in a Minority Neighborhood.

74. Prudential non-renewed Mr. and Mrs. Hammonds' policy. Prudential nonrenewed their policy because their home is located in a Minority Neighborhood.

75. Thereafter, Mr. and Mrs. Hammonds obtained homeowners insurance from Farmers. Farmers did not offer Mr. and Mrs. Hammonds the opportunity to purchase their policy on the same terms and conditions as others because their home is located in a Minority Neighborhood.

76. During the relevant time period, Mr. and Mrs. Kenner obtained homeowners insurance from Safeco. Safeco did not offer Mr. and Mrs. Kenner the opportunity to purchase their policy on the same terms and conditions as others because their home is located in a Minority Neighborhood.

77. Safeco canceled Mr. and Mrs. Kenner's policy. Safeco canceled their policy because their home is located in a Minority Neighborhood.

78. Mr. and Mrs. Kenner obtained homeowners insurance from Farmers Insurance Company. Farmers did not offer Mr. and Mrs. Kenner the opportunity to purchase their policy on the same terms and conditions as others because their home is located in a Minority Neighborhood.

79. Farmers canceled Mr. and Mrs. Kenner's policy. Farmers canceled their policy because their home is located in a Minority Neighborhood.

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80. As a result of Defendants' illegal underwriting, pricing, marketing and sales practices, Plaintiffs, Representative Plaintiffs and Class Members have been wrongfully denied the opportunity to purchase homeowners insurance on the same terms and conditions as others. This opportunity was denied on the basis of the racial composition of the neighborhoods of Plaintiffs, Representative Plaintiffs and Class Members.

81. As a further result of Defendants' illegal underwriting, pricing, marketing and sales practices, Plaintiffs, Representative and Class Members have suffered injuries including the relative and/or absolute diminution in value of their properties, the payment of excessive premiums, embarrassment, humiliation, emotional upset, losses not covered by insurance, and other compensable items of damage.

COUNT I
Fair Housing Act — 42 U.S.C. § 3601 et seq.

82. Plaintiffs and Representative Plaintiffs hereby adopt, reallege and incorporate by reference the allegations contained in Paragraphs I through 81.

83. At all times relevant to this Complaint, Defendants, either individually or collectively, have discriminated against Plaintiffs, Representative Plaintiffs and Class Members, based upon the racial composition of their neighborhoods, by offering them different and unfavorable terms and conditions with respect to the provision of homeowners insurance. Such discrimination violates Section 804(b) of the Fair Housing Act, 42 U.S.C. § 3604(b).

84. As a result of Defendants' illegal discrimination, Plaintiffs, Representative Plaintiffs and Class Members have suffered economic losses including, but not limited to, the relative and/or absolute diminution in value of their properties and excess premiums paid to Defendants.

85. As a further result of Defendants' illegal discrimination, Plaintiffs, Representative Plaintiffs and Class Members have suffered non-economic losses including, but not limited to, a loss of self-esteem, embarrassment, humiliation, emotional distress, mental anguish and a reduced quality of life.

86. Defendants engaged in these discriminatory practices with malice or with reckless indifference to the federally protected rights of Plaintiffs, Representative Plaintiffs and Class Members. Plaintiffs, Representative Plaintiffs and Class Members are therefore entitled to an award of punitive damages in an amount sufficient to punish Defendants or to deter Defendants and other companies from like conduct in the future.

87. Plaintiffs, Representative Plaintiffs and Class Members are entitled to recover from Defendants reasonable attorneys' fees and costs, as provided by Section 813(c)(2) of the Fair Housing Act, 42 U.S.C. § 3613(c)(2).

COUNT II
Civil Rights Act of 1870 — 42 U.S.C. § 1981

88. Plaintiffs hereby adopt, reallege and incorporate by reference the allegations contained in Paragraphs 1 through 87.

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89. At all times relevant to this Complaint, Defendants, either individually or collectively, have discriminated against Plaintiffs, Representative Plaintiffs and Class Members in the making of contracts of insurance, based upon the racial composition of their neighborhoods, by offering them different and unfavorable terms and conditions with respect to the provision of homeowners insurance, and by refusing to sell them such insurance. Such discrimination violates the Civil Rights Act of 1870, 42 U.S.C. § 1981.

90. As a result of Defendants' illegal discrimination, Plaintiffs, Representative Plaintiffs and Class Members have suffered economic losses including, but not limited to, the relative and/or absolute diminution in value of their properties and excess premiums paid to Defendants.

91. As a further result of Defendants' illegal discrimination, Plaintiffs, Representative Plaintiffs and Class Members have suffered non-economic losses including, but not limited to, a loss of self-esteem, embarrassment, humiliation, emotional distress, mental anguish and a reduced quality of life.

92. Defendants engaged in these discriminatory practices with malice or with reckless indifference to the federally protected rights of Plaintiffs, Representative Plaintiffs and Class Members. Plaintiffs, Representative Plaintiffs and Class Members are therefore entitled to an award of punitive damages in an amount sufficient to punish Defendants or to deter Defendants and other companies from like conduct in the future.

93. Plaintiffs, Representative Plaintiffs and Class Members are entitled to recover from Defendants reasonable attorneys' fees and costs, as provided by 42 U.S.C. § 1988.

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COUNT III
Civil Rights Act of 1866 — 42 U.S.C. § 1982

94. Plaintiffs hereby adopt, reallege and incorporate by reference the allegations contained in Paragraphs 1 through 93.

95. At all times relevant to this Complaint, Defendants, individually and collectively, have interfered with the ability of Plaintiffs, Representative Plaintiffs and Class Members to purchase, lease, sell, hold and convey real estate located in minority neighborhoods including the Minority Neighborhoods, based upon the racial composition of their neighborhoods, by offering them different and unfavorable terms and conditions with respect to the provision of homeowners insurance, and by refusing to sell them such insurance. Such discrimination violates the Civil Rights Act of 1866, 42 U.S.C. § 1982.

96. As a result of Defendants' illegal discrimination, Plaintiffs, Representative Plaintiffs and Class Members have suffered economic losses including, but not limited to, the relative and/or absolute diminution in value of their properties and excess premiums paid to Defendants.

97. As a further result of Defendants' illegal discrimination, Plaintiffs, Representative Plaintiffs and Class Members have suffered non-economic losses including, but not limited to, a loss of self-esteem, embarrassment, humiliation, emotional distress, mental anguish and a reduced quality of life.

98. Defendants engaged in these discriminatory practices with malice or with reckless indifference to the federally protected rights of Plaintiffs, Representative Plaintiffs and Class

Members. Plaintiffs, Representative Plaintiffs and Class Members are therefore entitled to an award of punitive damages in an amount sufficient to punish Defendants or to deter Defendants and other companies from like conduct in the future.

99. Plaintiffs, Representative Plaintiffs and Class Members are entitled to recover from Defendants reasonable attorneys' fees and costs, as provided by 42 U.S.C. § 1988.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs and Representative Plaintiffs, individually and/or on behalf of other persons similarly situated, pray for the following relief:

a. That the Court declare that Defendants' conduct complained of herein violates the Fair Housing Act, 42 U.S.C. § 3601, *et seq.*, and the Civil Rights Acts of 1866 and 1870, 42 U.S.C. §§ 1981 and 1982;

b. That the Court permanently enjoin Defendants and their owners, officers, management personnel, employees, agents, attorneys, successors and assigns, and those acting in concert therewith, from any further conduct violating Plaintiffs' rights, or the rights of the Class Members, under the Fair Housing Act and the Civil Rights Acts of 1866 and 1870;

c. That the Plaintiffs and Class Members be awarded compensatory damages;

d. That the Plaintiffs and Class Members be awarded punitive damages;

e. That the Plaintiffs and Class Members be awarded their attorneys' fees and costs incurred in prosecuting this action; and

f. That the Plaintiffs and Class Members be awarded such additional and further relief as the Court deems just and proper.

JURY DEMAND

Plaintiffs and Representative Plaintiffs, individually and/or on behalf of other persons similarly situated, hereby request a trial by jury on all counts of their Complaint.

Respectfully submitted,

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Appendix E

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APPENDIX F — RELEVANT STATUTES INVOLVED

42 U.S.C. § 3604

§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful —

> **(a)** To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> **(b)** To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, familial status, or national origin.

* * *

42 U.S.C. § 3613

§ 3613. Enforcement by private persons

(a) Civil action

(1)(A) An aggrieved person may commence a civil action in an appropriate United States district court or State court not later than 2 years after the occurrence or the termination of an

alleged discriminatory housing practice, or the breach of a conciliation agreement entered into under this subchapter, whichever occurs last, to obtain appropriate relief with respect to such discriminatory housing practice or breach.

(2)

Supreme Court, U.S.
F I L E D
DEC 16 1998

No. 98-788

In The Supreme Court of the United States

October Term, 1998

CYNTHIA E. CANADY, *et al.*,
Petitioners,

v.

ALLSTATE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals for The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counsel of Record
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24 pp

QUESTION PRESENTED

Whether dismissal without prejudice of a complaint against thirteen unrelated insurance company groups because of plaintiffs' failure, after discovery, to present sufficient evidence of indirect injury traceable to each company diminishes the integrity of the Court's decisions in *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), or of the Fair Housing Act, 42 U.S.C. §3601 (1994), et seq.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioners:

Cynthia E. Canady; Marva Jean Saunders; Mischelle A. Greer; Jimmy D. Hunt; Tamara A. Hunt; Kim Y. Nickerson; Esther E. Moten; Kerry L. Butler; Nadine Farris; Charles Lockridge; Coleman McClain; Evalin McClain; Alma Hammonds; John Hammonds; Sara Kenner; and Clarence Kenner.

Respondents:

Allstate Insurance Company; American Family Mutual Insurance Company; American Economy Insurance Company; American States Insurance Company; American States Preferred Insurance Company; Federal Insurance Company; Pacific Indemnity Insurance Company; Vigilant Insurance Company; Sun Insurance Office of America, Inc.; Sea Insurance Company of America; Liberty Mutual Insurance Company; Farm Bureau Town & Country Insurance Company of Missouri; Farmers Insurance Exchange; Fire Insurance Exchange; Mid-Century Insurance Company; Farmers & Merchants Insurance Company; Prudential Property and Casualty Insurance Company; Safeco Insurance Company; Shelter Mutual Insurance Company; Shelter General Insurance Company; State Farm Fire and Casualty Company; State Farm General Insurance Company; and Old Reliable Casualty Company.

This Brief in Opposition is being filed on behalf of the following respondents: Farmers Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, American Family Mutual Insurance Company, and Prudential Property and Casualty Insurance Company.

Mid-Century Insurance Company is owned by Truck Insurance Exchange, Fire Insurance Exchange and Farmers Insurance Exchange. Truck Insurance Exchange, Fire Insurance Exchange and Farmers Insurance Exchange are, in turn, owned by policyholders and managed by attorneys-in-fact, which are indirect subsidiaries of Zurich Financial Services. There are no nonwholly-owned subsidiaries of Mid-Century Insurance Company, Farmers Insurance Exchange or Fire Insurance Exchange.

American Family Mutual Insurance Company is a Wisconsin mutual insurance corporation owned by its policyholders. It does not have any nonwholly-owned subsidiaries or parent companies.

The Prudential Insurance Company of America is the parent company of Pruco, Inc. Pruco, Inc. is the parent company to Prudential Property and Casualty Insurance Company. Prudential Property and Casualty Insurance Company is the parent company to Prudential General Insurance Company, Prudential Commercial Insurance Company, Prudential Insurance Brokerage Inc., and Merastar Insurance Company. There are no nonwholly-owned subsidiaries of Prudential Property and Casualty Insurance Company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. B) is unreported. The opinion of the district court (Pet. App. D) is unreported.

STATEMENT OF JURISDICTION

The court of appeals entered an order denying the Petition for Rehearing and Suggestion for Rehearing En Banc on August 7, 1998 (Pet. App. A). Petitioners invoked the jurisdiction of the Court under 28 U.S.C. § 1254(1) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions reproduced in the petition, Pet. at 1-2, this case involves Article III, Section 2 of the United States Constitution, which extends "[t]he judicial Power . . . to all Cases [and] . . . Controversies . . ."

STATEMENT OF THE CASE[1]

On February 14, 1996, petitioners filed a class action complaint in the United States District Court for the Western District of Missouri against thirteen unrelated groups of insurance companies ("insurance companies" or "companies"). They sought certification of two classes

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This Brief in Opposition is being filed on behalf of the following repondent-companies: Farmers Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, American Family Mutual Insurance Company, and Prudential Property and Casualty Insurance Company.

totaling approximately 93,000 homeowners residing in the "predominantly minority neighborhoods" of Kansas City and St. Louis. Petitioners defined the neighborhoods as those zip codes having a minority population of greater than fifty percent.

Petitioners alleged that the insurance companies discriminated by making homeowners insurance less available and less affordable in the "predominantly minority neighborhoods" than elsewhere.[2] Petitioners alleged that this discrimination violated: (i) sections 804(a), 804(b), and 813 of the Fair Housing Act (the "FHA") (42 U.S.C. §§3604(a)-(b), 3613 (1994); and (ii) sections 1981, 1982 and 1985(3) of the Civil Rights Acts (42 U.S.C. §§1981, 1982 and 1985(3) (1994)). They also asserted state law civil conspiracy claims against the insurance companies.

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The petition contains several inaccurate and misleading statements concerning the business practices of the insurance companies. For example, petitioners begin their Statement of the Case by alleging that "the Missouri Department of Insurance ("Department") has specifically concluded that 'the big white insurers . . . are redlining.'" Pet. Br., p. 2. In fact, the Department has reached no such conclusion, officially or otherwise, regarding the insurance companies' business practices. The internal Department memorandum from which petitioners quote does not purport to represent any official conclusions of the Department; it merely sets forth the unsupported, inaccurate allegations of a single Department employee, which an official representative of the Department has specifically repudiated. Dep. of Stephen Stark at 370-76. The petition also makes blanket generalizations regarding business practices allegedly employed by all of the insurance companies. Petitioners' attempt to portray certain inaccurately-described underwriting, marketing and sales practices as uniform among the insurance companies is wholly inconsistent with the record in this case.

On October 10, 1996, the district court dismissed the conspiracy claims, as well as the claim under section 804(a) of the FHA. On the same day, the district court denied the insurance companies' motions to dismiss the action for lack of standing. Pet. App. D, p. 30a. The court stated that the allegations of diminished property values could provide a basis for standing "so long as [such diminution in property values] is fairly traceable to [respondents'] acts or omissions." Pet. App. D., p. 25a. Since that ruling, petitioners have relied upon their allegations of a purported "indirect injury" arising from the alleged diminution of their property values for Article III standing to sue all of the companies in one action.

Pursuant to a negotiated discovery and briefing order, the parties conducted three months of discovery on class certification issues. The parties deposed more than fifty witnesses, including executives from most of the companies, all of the named plaintiffs, and twelve expert witnesses. The insurance companies produced extensive computerized data and tens of thousands of pages of documents. Following this discovery, petitioners moved for class certification, submitting three briefs and four volumes of appendix materials in support. The companies' opposition included seven volumes of appendix materials. After reviewing these evidentiary submissions, the district court denied class certification and dismissed the action for lack of standing. The dismissal was without prejudice. Pet. App. C, p. 20a.

The district court acknowledged its previous denial of the companies' motions to dismiss for lack of standing, and reiterated that "an indirect injury is often sufficient to establish standing to sue if the injury is fairly traceable to the conduct of the defendants." Pet. App. C, p. 18a. The court

further explained that "[d]ismissal of plaintiffs' case on standing grounds would have been premature at [the pleading] stage because the class was not well-defined and class discovery had not yet taken place." Pet. App. C, p. 19a. The district court concluded, however, that "[a]s litigation progresses, . . . and the facts and basis of the litigation become apparent, reasonable inferences are no longer afforded and plaintiffs' allegations must clearly indicate that standing is proper." *Id.* After completion of class certification discovery, the district court reexamined petitioners' indirect injury allegations against the extensive evidence before it. It determined that the evidence did not sustain their indirect injury theory as a basis for Article III standing.

The district court held that the Missouri-wide, amorphous "neighborhoods" defined by petitioners did not begin to resemble "the 'relatively compact neighborhood' envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979)[,]" and that petitioners had not demonstrated that each resident of these "neighborhoods" had suffered a "distinct and palpable injury" at the hands of each of the thirteen unrelated insurance company groups. Pet. App. C, p. 9a.

The district court concluded that petitioners lacked standing because: (i) no individual petitioner had alleged to have been directly injured by each of the insurance companies; (ii) petitioners failed to sufficiently allege that the insurance companies had engaged in a civil conspiracy or other joint action; and (iii) they had not put forward sufficient proof of an indirect injury fairly traceable to each company's conduct.

The district court's dismissal was *without prejudice* and expressly left open to "each plaintiff who chooses to do so" the opportunity to "refile against the defendant or defendants with whom each plaintiff has alleged grievances." Pet. App. C, p. 20a. Shortly thereafter, petitioners filed separate class actions against most of the insurance companies. They also appealed the district court's dismissal of their claims to the United States Court of Appeals for the Eighth Circuit. After hearing oral argument, and with an extensive record on appeal before it, the Eighth Circuit adopted the ruling of the district court.[3] The Eighth Circuit then denied petitioners' request for rehearing *en banc* without dissent. Petitioners now seek a writ of certiorari.

REASONS FOR DENYING THE WRIT

In their effort to persuade this Court to invoke its rarely exercised supervisory powers, petitioners have mischaracterized the district court's order, contending that it "conflicts directly" with *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979), and *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). They assert incorrectly that the district court dismissed the case because each plaintiff had not alleged a *direct* injury caused by the conduct of each insurance company.

Actually, however, the district court dismissed the case *on its facts*, concluding that petitioners had not demonstrated either a direct or indirect injury fairly traceable

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[3] The Eighth Circuit's unpublished *per curiam* order adopted the district court's opinion pursuant to Circuit Rule 47B, reserved for instances in which "an opinion would have no precedential value."

to the conduct of each insurance company. The district court's ruling is consistent with -- and indeed expressly based upon -- *Trafficante*, *Gladstone* and *Havens*.

The district court acknowledged that, under these cases, allegations of an indirect, "neighborhood injury" may sometimes be sufficient to confer standing at the pleading stage of an FHA case. It went on, however, to hold that a "class comprised of every predominantly minority zip code in Kansas City and St. Louis, numbering at least 93,000 persons is not the 'relatively compact neighborhood' envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979) and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact." Pet. App. C, p. 9a. The district court thus correctly applied this Court's decisions in determining that petitioners' "indirect injury" standing theory, though sufficiently pled, ultimately failed on the facts. Contrary to petitioners' contentions, there is no "direct conflict" between the district court's order and this Court's rulings. At most, the petition can be read as presenting a lower court's dismissal based upon a "misapplication of a properly stated rule of law" or "erroneous factual findings." That is not what the lower did, but even if it were, this would not warrant Supreme Court review. Sup. Ct. R. 10.

The district court's dismissal of the case does not foreclose petitioners' ability to seek relief under the FHA, or in any way imperil the integrity of that statute. Its dismissal without prejudice provided petitioners the opportunity to refile separate claims against the insurance companies, and they have since filed separate actions against most of the original defendant companies.

I.

THE LOWER COURT'S DISMISSAL DID NOT IMPERIL THE INTEGRITY OF THIS COURT'S "INDIRECT INJURY" STANDING DECISIONS.

A. The Minimum Article III Standing Requirements

To possess standing to pursue any claim, including a claim of "indirect injury," a plaintiff must satisfy the minimum Article III requirements articulated in *Warth v. Seldin*, 422 U.S. 490 (1975), and *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). *Lujan* restated the three basic requirements of Article III standing: (i) a concrete, particularized and non-speculative "injury in fact," which is (ii) "fairly traceable" to the challenged conduct of the defendant(s), and (iii) likely to be "redressed by a favorable decision." *Lujan*, 504 U.S. at 560-561.

These requirements apply to class actions as well as individual actions. Unless a class representative can demonstrate that he or she personally has standing under Article III to sue each named defendant, that plaintiff may not seek relief either individually, or on behalf of a class of persons similarly-situated. *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974).

Article III standing requirements do not disappear when a plaintiff alleges indirect injury. On the contrary, an indirect injury claim increases the plaintiff's burden to demonstrate standing. Indirectness of injury, though not fatal to standing, "may make it substantially more difficult to meet the minimum requirement[s] of Art[icle] III," *Warth*, 422 U.S. at 505, and will require "further particularized

allegations of fact deemed supportive of [the] plaintiff's standing." *Id.* at 501. Moreover, while allegations of indirect injury may be sufficient at the pleadings stage, as the case proceeds, the plaintiff's burden to demonstrate standing increases, and simple allegations no longer suffice. *Lujan*, 504 U.S. at 561.

Petitioners had a particularly heavy evidentiary burden as to standing: they not only had to provide "further particularized allegations of fact" as required by *Warth* to support their indirect injury claim; they also had to provide substantive evidence to support their indirect injury allegations because class certification discovery had taken place, and the case had moved beyond the pleadings stage.

B. Nothing in the District Court's Decision Threatens the Integrity of the Decisions of this Court.

The district court's ruling is wholly consistent with this Court's decisions in *Trafficante*, *Gladstone*, and *Havens*. Read together, *Trafficante*, *Gladstone*, and *Havens* stand for the proposition that an FHA claimant may have Article III standing at the pleading stage of the case, based upon allegations (i) of indirect injury to a "relatively compact" area within which the claimant resides which has been the target of a defendant's intentionally discriminatory conduct; and (ii) that the claimant has suffered a "distinct and palpable," non-speculative injury, fairly traceable to the challenged conduct of the defendant.

Trafficante involved allegations of discriminatory "racial steering" practices in violation of the FHA in apartment rental practices. *Trafficante*, 409 U.S. at 207-208. The standing issue arose at the pleading stage. Without

reaching the merits of the case, the trial court held that the plaintiffs did not have standing to sue under the FHA because they were not direct targets of the defendant's discriminatory conduct. *Id.* This Court reversed, holding that direct injury was not necessarily required to sufficiently allege standing. However, the Court recognized that the indirect injury concept has limits, and held that it could only confer standing on residents of the "same housing unit" who are actually injured within the meaning of the FHA. *Id.* at 212.

Gladstone also involved allegations of racial steering, this time in connection with home sales. *Gladstone*, 441 U.S. at 94-95. Again, the standing issue arose at the pleading stage of the case. The Court followed *Trafficante*, holding that allegations of an indirect injury may be sufficient to confer standing under section 812 of the FHA *at the pleading stage*. However, the Court emphasized that Article III standing requirements remain and that a plaintiff's standing to sue is ultimately "determined by the presence or absence of a 'distinct and palpable injury' . . . resulting from [the defendants'] conduct." *Id.* (citations omitted). Further, *Gladstone* expressly noted that certain neighborhoods could never successfully assert a neighborhood injury:

> A "neighborhood" whose racial composition allegedly is being manipulated may be so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident.

Id. at 114.

Like *Trafficante, Havens* involved allegations of racial steering in connection with apartment rental practices. As with *Trafficante* and *Gladstone*, the standing issue arose at the pleading stage. The defendant argued that the two individual plaintiffs, who did not live in the subject apartment complexes, had failed to demonstrate how their neighborhoods were affected by the alleged steering practices. The Court agreed:

> It is indeed implausible to argue that [the defendants'] alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area . . . Our cases have upheld standing based on effects of discrimination only within a 'relatively compact neighborhood' . . . We have not suggested that discrimination within a single housing complex might give rise to [a] 'distinct and palpable injury' . . . throughout a metropolitan area.

Havens, 455 U.S. at 377. The Court nevertheless permitted the *Havens* plaintiffs to pursue their indirect injury claim because the case was still at the pleading stage. *Id.* at 377-378

The instant case presented the district court with a disparate impact claim against thirteen unrelated groups of homeowners insurance companies, on behalf of the approximately 93,000 residents of every Missouri zip code having a minority population of greater than fifty percent. Like the plaintiffs in *Trafficante*, *Gladstone* and *Havens*, petitioners have relied upon an indirect injury theory as their basis for Article III standing. That is, however, both the

beginning and the end of any factual similarity between those decisions and this case.

First, *Trafficante*, *Gladstone* and *Havens*, examined the plaintiffs' allegations at the pleading stage, and explicitly emphasized that the adequacy of proof of the plaintiffs' standing was not before the Court. *Gladstone,* 441 U.S. at 115 ("The adequacy of proof of respondents' standing is not before us."); *Trafficante*, 409 U.S. at 209-210 ("Individual injury or injury in fact . . . is alleged here. What the proof may be is one thing[.]"); *Havens*, 455 U.S. at 377-78 ("[I]n the absence of further factual development, we cannot say as a matter of law that no injury could be proved . . . Under the liberal federal pleading standards . . . dismissal on the pleadings is inappropriate."). The district court here acknowledged those decisions in denying the insurance companies' motions to dismiss for lack of standing at the initial pleading stage of this case.

Once this case had proceeded beyond the pleading stage, however, the district court was obligated to consider the record in determining whether the plaintiffs had standing. *Lujan*, 504 U.S. at 561 (holding that standing is "an indispensable part of the plaintiff's case" that "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation"). The district court's dismissal in this case took place after development of an extensive record during class certification

discovery.[4] The district court considered the evidence before it and appropriately dismissed the case (without prejudice).

Petitioners presented no "particularized allegations of fact" to support their claims of diminished property values caused by the challenged practices of the insurance companies. Some of the named plaintiffs themselves testified during class discovery that their property values, and property values generally in their neighborhoods, had actually *increased* over the relevant time period. The sociologist on whose opinion petitioners relied for their indirect injury theory failed to offer any opinion or testimony articulating a causal link between the petitioners' purported indirect injury and the challenged conduct of the insurance companies. The district court found that the record suggested no correlation between zip code boundaries and "neighborhoods," and that "several distinct neighborhoods are often lumped together in one zip code[.]" At the close of class discovery, there was no factual support for petitioners' indirect injury theory.

Second, petitioners failed to show that their statewide neighborhood was relatively compact. The "target area" -- a

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[4] Just as a district court must dismiss a case for lack of subject matter jurisdiction *at any stage of a proceeding*, it must also do so for lack of standing. Fed. R. Civ. P. 12(h)(3); *National Organization for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) ("Standing represents a jurisdictional requirement which remains open to review at all stages of the litigation.") In class action cases, the Article III standing requirements must be met "at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23." *Sosna v. Iowa*, 419 U.S. 393, 402 (1975). Therefore, it was not only appropriate and within its discretion for the district court to consider the question of petitioners' standing at the class certification stage of this case, it was incumbent upon it to do so.

state-wide area comprised of twenty-five zip codes including more than 93,000 individual homeowners living in widely varying housing stock -- is not remotely like the "relatively compact" areas in *Trafficante* and *Gladstone* (a single apartment complex and a 12-by-13 block area, respectively). In *Havens*, where the plaintiffs described their "neighborhood" as the entire area of Richmond, the Court viewed as "implausible" the plaintiffs' claim that a single defendant's alleged intentional "acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area." 455 U.S. at 377. "Our cases have upheld standing based on effects of discrimination only within a 'relatively compact neighborhood.'" *Id.*, *quoting Gladstone*.

After class certification discovery, it became evident that petitioners' defined "neighborhood" was simply too large to qualify as having suffered a "distinct and palpable" injury. Without that, the district court properly determined that petitioners lacked Article III standing, and dismissed the case.

Third, petitioners' indirect injury claim is far less "concrete" and demonstrable than were the indirect injury claims at issue in *Trafficante*, *Gladstone* and *Havens*. Each of these cases involved allegations that a single defendant group had indirectly injured a defined "neighborhood" through acts of intentional discrimination ("racial steering"). By contrast, petitioners here have relied on an allegation that the non-discriminatory conduct of all thirteen unrelated defendant groups indirectly injured every resident of the defined "neighborhoods" because it had a disparate impact on the defined neighborhoods. Consequently, petitioners were faced with the exceedingly difficult task of demonstrating that they had suffered "a distinct and palpable injury" that was

"fairly traceable" to the non-discriminatory conduct of each of the respondent groups. Given the sprawling and amorphous nature of petitioners' defined "neighborhoods," petitioners did not (and could not) make such a showing.

II.

THE LOWER COURT'S DISMISSAL DID NOT IMPERIL THE INTEGRITY OF THE FAIR HOUSING ACT.

An FHA plaintiff must satisfy the fundamental Article III standing requirements at all stages of a lawsuit. *Lujan*, 504 U.S. at 560-61; *Trafficante*, 409 U.S. at 209-210; *Gladstone*, 441 U.S. at 99-100; *Havens*, 455 U.S. at 372-73. The district court dismissed petitioners' FHA claims because petitioners did not sufficiently demonstrate compliance with these constitutional requirements, and expressly granted them the right to refile. The lower courts did not imperil the integrity of the FHA, but rather recognized that under *Trafficante*, *Gladstone*, and *Havens*, suits under the FHA always remain subject to the fundamental standing requirements of Article III.

CONCLUSION

There is no reason for the Court to exercise its supervisory powers in this case. The district court's decision subscribes to the opinions of the Court with which it is alleged to conflict. It is grounded on petitioners' failure to produce evidence supporting their contentions of indirect injury. The dismissal was without prejudice and petitioners have already filed new complaints.

For the foregoing reasons, the Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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No. 98-788

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

CYNTHIA CANADY, *et al.*,
Petitioners,

vs.

ALLSTATE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI BY LIBERTY MUTUAL INSURANCE COMPANY AND OLD RELIABLE CASUALTY COMPANY

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Respondents: Allstate Insurance Company; American Economy Insurance Company; American Family Mutual Insurance Company; American States Insurance Company; American States Preferred Insurance Company; Farm Bureau Town & Country Insurance Company; Farmers & Merchants Insurance Company; Farmers Insurance Exchange; Federal Insurance Company; Fire Insurance Exchange; Liberty Mutual Insurance Company; Mid-Century Insurance Company; Old Reliable Casualty Company; Pacific Indemnity Insurance Company; Prudential Property & Casualty Company; Safeco Insurance Company; Sea Insurance Company of America; Shelter General Insurance Company; Shelter Mutual Insurance Company; State Farm Fire and Casualty Company; State Farm General Insurance Company; Sun Insurance Office of America, Inc.; Vigilant Insurance Company.

This Opposition is filed on behalf of respondents Liberty Mutual Insurance Company and Old Reliable Casualty Company.

Subsidiaries of Liberty Mutual Insurance Company are:

St. James Realty Corporation
Subsidiary St. James Management Company Ltd.
Cascade Rehabilitation Counsel
Liberty Northwest Insurance Co.
Subsidiary - Helmsman Management Services
Subsidiary - Liberty Health Plan, Inc.
Steinroe Services, Inc.
Subsidiary - Stein Roe & Farnham Incorporated
Liberty Insurance Corporation
Keyport Life Insurance Company
Subsidiary - Keyport Financial Services Corporation
Subsidiary - Keyport Advisory Services, Inc.
Helmsman Management Services, Inc.
Liberty Life Assurance Company
Helmsman Insurance Agency, Inc.
Liberty Mutual Equity Corporation
Subsidiary - Liberty Real Estate Corporation
Subsidiary - Liberty Financial Services, Inc.
Subsidiary - Liberty Investment Services, Inc.
Subsidiary - Liberty Securities Corporation
Subsidiary - Liberty Investment Services, Inc.
Subsidiary - Liberty Financial International
Subsidiary - Liberty Asset Management Company
Subsidiary - Copley Venture Capital, Inc.
Liberty Lloyds of Texas Insurance
Liberty Mutual Capital Corporation
Liberty Housing Corp.
Liberty Mutual Property-Casualty Company
LM Insurance Corporation
First Liberty Insurance Corporation
LRE Properties, Inc.

Liberty Funding, Inc.
Liberty Energy Corporation
    Subsidiary - Liberty Energy Gulf Corporation
Weston Agency Services, Inc.
Liberty International Holding Company
Atlantic Health Group, Inc.
    Subsidiary - Georgia Health Group PC, Inc.
Liberty Real Estate
Workwell Health & Safety, Inc.
Datachem Software

Old Reliable Casualty Company is a wholly owned subsidiary of The Reliable Life Insurance Company.

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Rule 23(a), Federal Rules of Civil Procedure 4

Statement Of The Case

Petitioners' statement of the case is incomplete and, in some respects, quite misleading. Liberty Mutual Insurance Company (Liberty Mutual) and Old Reliable Casualty Company (Old Reliable) will therefore supply their own statement of the case.

This case purports to be a class action under the Fair Housing Act (FHA), 42 U.S.C. § 3601, *et seq.* Petitioners allege that they reside in minority neighborhoods, primarily in Kansas City, Missouri. Defendants are 23 insurance companies that offer homeowners insurance in Missouri. The Complaint alleges that defendants have adopted underwriting practices that reduce the availability and increase the cost of insurance in minority neighborhoods. Petitioners claim that these practices violate the FHA, on both disparate treatment and disparate impact theories.

The individual defendants' practices, and the number of policies sold in minority neighborhoods, vary widely. For example, one of petitioners' experts testified that Liberty Mutual sold a statistically significant excess number of basic homeowners policies in minority neighborhoods. D.App. 1.[1] Old Reliable sells a different type of insurance than the other defendants. It sells dwelling fire policies that do not include liability coverage or replacement value coverage. Thus, Old Reliable does not use any of the underwriting criteria that petitioners challenge. Old Reliable writes the majority of its business in minority neighborhoods. Its rates depend solely upon the level of fire protection in the area where the insured home is located and its rates in minority neighborhoods in Kansas City and St. Louis are the lowest rates it charges anywhere.

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[1] In the appendix to this brief, Liberty Mutual has reproduced portions of the appendix filed in the court of appeals. See references to D.App._.

None of the named plaintiffs either purchased or attempted to purchase insurance from Liberty Mutual.[2] Liberty Mutual therefore filed a motion to dismiss for lack of standing. Petitioners argued that they did have standing based on indirect injury. Their theory was that Liberty Mutual had discriminated against other persons not party to the lawsuit and that such discrimination caused petitioners both economic and non-economic injury. App. 271; 29a-30a, *citing Mackey v. Nationwide Ins. Co.*, 724 F.2d 419, 422-23 (4th Cir. 1984). Accepting those allegations as true, the District Court held that it was "conceivable" that petitioners had standing, and denied the motion. App. 30a.

The parties then commenced discovery on petitioners' motion for class certification. While petitioners assert that this discovery was "limited," Pet. at 4, it involved the production of tens of thousands of pages of documents by defendants and more than fifty depositions, including four experts for petitioners. The parties submitted a substantial portion of this evidence to the District Court in conjunction with the class certification issues.

The parties' class certification submissions clarified petitioners' theory of indirect injury in two important respects. First, petitioners proposed to establish that injury on a metropolitan-wide basis, instead of a neighborhood-by-neighborhood basis. Petitioners proposed a class consisting of every person residing in any zip code that was more than 50% minority. They alleged that they had proven indirect injury to "every person owning a home in the affected minority neighborhood, regardless of each person's individual experiences or ability to obtain insurance." App. 9a. In short, they proposed to argue that alleged discrimination against one person in one zip code indirectly injured

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[2] Earlier versions of the complaint alleged that one plaintiff had obtained insurance from Liberty Mutual. In discovery, Liberty Mutual established that this allegation was the product of a mistake. The Third Amended Complaint does not allege that any plaintiff had any contact with Liberty Mutual.

persons residing in other zip codes many blocks or even miles away.

Second, petitioners proposed to establish this allegation via expert testimony that rested on pure speculation. Their expert, Dr. Gregory D. Squires, submitted an expert report alleging that such discrimination is "a contributing cause" to the "deterioration of minority communities." D.App. 2. Dr. Squires acknowledged that there were many other causes for such deterioration and that he could not quantify the impact of the alleged insurance discrimination. D.App. 3. Moreover, Dr. Squires' opinions were generic rather than specific. He has engaged in no "studies of housing or insurance or any other features of St. Louis and Kansas City." D.App. 4. He was not familiar with the various neighborhoods of St. Louis or Kansas City, D.App. 5, and his opinion would be the same for a lawsuit involving minority neighborhoods in Kansas as it would be for Missouri. D.App. 6. In short, petitioners proposed to establish their indirect injury standing by an expert who had made no study whatever of the communities on which he was opining and who could not possibly quantify the impact of the alleged insurance discrimination.

Based on these submissions, the District Court concluded that petitioners had failed to prove the indirect injury they had alleged. App. 9a. As a result, the District Court concluded that petitioners lacked standing to bring claims against defendants against whom they alleged no direct injury. App. 20a. The District Court dismissed the Complaint, without prejudice to plaintiffs' refiling against defendants as to whom they did have standing. *Id.*

Reasons Why The Writ Should Be Denied

I. The Petition Completely Mischaracterizes The Opinions Of The Courts Below.

The thesis of this Petition is that the courts below held, as a matter of law, that petitioners lack standing to sue defendants against whom they have alleged no direct injury. Pet. at 5; 11-12. This is a complete mischaracterization of the ruling. The District Court found that petitioners lacked standing to sue for indirect injuries *as a matter of fact*, because they "have not borne their burden of proving" that class members in the designated areas had "suffered injury in fact." App. 9a. This Court's precedents are not only consistent with the actual holding; they require it.

Since none of the petitioners ever had any direct contact with Liberty Mutual or Old Reliable, their standing to sue Liberty Mutual and Old Reliable depends entirely on the success of their indirect injury theory. The District Court's order on standing refers to the order denying the motion to dismiss, and recognizes that "an indirect injury is often sufficient to establish standing to sue if the injury is fairly traceable to the conduct of the defendants." App. 18a. In ruling on a motion to dismiss, petitioners were entitled to "every reasonable inference." App. 19a. Dismissal on the pleadings "would have been premature," because "the class was not well-defined and class discovery had not yet taken place." App. 19a.

The order on standing also holds that when the "facts and basis of the litigation become apparent," petitioners are no longer entitled to every reasonable inference. App. 19a, *citing Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Rather, they must present evidence proving that they have, in fact, sustained indirect injury. Based on "the proposed class definition as well as the 23(a) factors," the order concludes that "plaintiffs do not have standing." App. 19a.

The discussion of the proposed class definition makes it crystal clear that the basis for this conclusion was that petitioners had failed to prove indirect injury. While petitioners claimed that they had produced evidence of such injury, they "have actually not so proven." App. 9a:

> A class comprised of every predominantly minority zip code in Kansas City and St. Louis is not the "relatively compact neighborhood" envisioned by *Gladstone, Realtors v. Bellwood*, 441 U.S. 91, 114 (1979), and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact.

Id., citing South Suburban Housing Center v. Santefort Real Estate, Inc., 658 F. Supp. 1450 (N.D. Ill. 1987), *modified on other grounds*, 857 F.2d 1476 (7th Cir. 1988).

In short, the District Court dismissed the action because petitioners could not prove what they pleaded. Each of the cases on which petitioners rely explicitly recognizes that pleading is not a substitute for proof. *Bellwood, supra*, 441 U.S. at 115 ("[t]he adequacy of proof of respondents' standing is not before us"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377-78 (1982) ("in the absence of further factual development, we cannot say as a matter of law that no injury could be proved . . . Under the liberal federal pleading standards, . . . dismissal on the pleadings is inappropriate . . ."); *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209 (1972) ("[i]ndividual injury or injury in fact . . . is alleged here. What the proof may be is one thing"). *Lujan* squarely holds that standing is "an indispensable part of the plaintiff's case" that "must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation." 504 U.S. at 561.

In context, therefore, the opinions below reject petitioners' claims on the facts, not on the law. This Court does "not grant

a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

II. The Courts Below Correctly Applied This Court's Precedents To The Facts Of The Instant Case.

This Court has upheld standing based on indirect injury only within a relatively compact neighborhood. In the instant case, petitioners claimed indirect injury on a metropolitan-wide basis. In other words, they alleged that discrimination against a homeowner in one part of Kansas City indirectly injured other homeowners in entirely unrelated neighborhoods, blocks or even miles away from the site of the alleged discrimination. The courts below properly recognized that any such injury is far too attenuated to be fairly traceable to the alleged discrimination or to be redressed by a favorable judgment.

The "irreducible constitutional minimum of standing contains three elements." *Lujan*, *supra*, 504 U.S. at 560. These are:

A. A concrete and particularized injury in fact;

B. A "causal connection between the injury and the conduct complained of," such that the injury is 'fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court'"; and

C. Proof that it is "'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'"

Id. at 560-61, *quoting Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26 (1976).

In recognition of these principles, this Court has authorized indirect injury standing only for residents of a "relatively compact neighborhood." *Bellwood*, *supra*, 441 U.S. at 114.

Trafficante involved a single apartment complex, albeit a large one. 409 U.S. at 206. *Bellwood* involved a 12 by 13 block residential neighborhood. 441 U.S. at 113.[3] In *Coleman*, this Court expressly rejected the concept of metropolitan-wide indirect injury as a basis for standing:

> It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the *entire* Richmond metropolitan area. . . . Our cases have upheld standing based on the effects of discrimination only within a relatively compact neighborhood . . . . We have not suggested that discrimination within a single housing complex might give rise to distinct and palpable injury . . . throughout a metropolitan area.

455 U.S. at 377 (emphasis original) (citations and internal punctuation omitted).

The reason for this rule is obvious. The inference of causation, and the likelihood of redressing indirect injury, become much more speculative when the plaintiff is not an immediate neighbor of the direct victim of alleged discrimination. In *Santefort*, the "neighborhood" encompassed 220 square miles and more than 400,000 residents. In holding that plaintiffs lacked standing to claim indirect injury, the Court concluded:

> The area is too broad, the impact of defendants' conduct too attenuated, the relief requested too narrow to have the effect of creating a stable, racially-integrated community sought by the plaintiffs. There are simply too many intervening

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[3] Petitioners' suggestion that this Court allowed standing to "every homeowner in the Village of Bellwood," Pet. at 9, is just plain wrong. The "target neighborhood" was "only a part" of the Village. 441 U.S. at 113 n.27. This Court held that persons residing outside the target neighborhood, who had not alleged any indirect injury, did not have standing to sue. *Id.* at 112 n. 25.

> factors, historical and empirical, to suggest that the situation might have been better had [defendants] acted otherwise, and might improve were the court to afford relief.

658 F. Supp. at 1459 (citations and internal punctuation omitted).

The instant case presents substantially greater problems of proof, because it involves insurance rather than racial steering. In each of the cases on which petitioners rely, the alleged violation was racial steering by real estate agents of prospective tenants or homeowners. The concrete injury sustained was the loss of the social, economic and professional benefits of living in a racially integrated area. Plaintiffs alleged that the racial steering "is affecting the village's racial composition, replacing what is presently an integrated neighborhood with a segregated one." *Bellwood*, *supra*, 441 U.S. at 110. Assuming they could prove that allegation, plaintiffs' injury was fairly traceable to the challenged conduct and a judgment for plaintiffs would be likely to redress it.

In the instant case, the alleged violation is discrimination in the terms and conditions on which defendants offer homeowners insurance. App. 43a-45a ¶ 48; App. 51a ¶ 83. According to Dr. Squires, the indirect injury allegedly sustained is "the deterioration of minority communities" and defendants' sales practices were a "contributing cause" to those problems. D.App. 2. As even Dr. Squires admitted, there are numerous causes for the decline of the inner city unrelated to the cost or availability of homeowners insurance - job loss, capital flight, government policies, racial steering and mortgage lender discrimination. D.App. 7. As a result, Dr. Squires cannot "quantify the impact insurers have had on the decline" of minority neighborhoods. D.App. 3.

These admissions are fatal to petitioners' theory of standing based on indirect injury:

> Plaintiffs' burden to show causation is unusually heavy; in an area fraught with complex motivations and factors, plaintiffs must show that changing one or two factors would have substantially affected the result. As plaintiffs themselves concede, "one cannot separate out the factor of VA and FHA financing and speculate what would have happened without it." . . . Unfortunately, this is precisely what is required before judicial authority can be exercised.

Jorman v. Veterans Administration, 830 F.2d 1420, 1425 (7th Cir. 1987).

In light of the other causes of community deterioration, Liberty Mutual doubts that any plaintiff could make a non-speculative showing that such deterioration is fairly traceable to alleged insurance discrimination. If such a showing is possible, it has to be evaluated on a block-by-block basis. In the context of insurance, any effort to go beyond one or two blocks produces a constitutionally unacceptable degree of speculation.

By contrast, petitioners propose to find indirect injury on a metropolitan-wide basis. Their theory is that discrimination against a person residing in a minority zip code at, for example, 86th and Troost in Kansas City causes segregation and a deteriorated community in a minority zip code seven miles away at 24th and Brooklyn. There is no conceivable way to prove that causal connection, or that ending the discrimination at 86th Street would have the slightest effect on the 24th Street neighborhood.

There is no foundation whatever for Dr. Squires' opinions on this issue. He has engaged in no "studies of housing or insurance or any other features of St. Louis and Kansas City." D.App. 4. None of his publications rested on "empirical data that was collected out of St. Louis or Kansas City." D.App. 8. He was not familiar with the various neighborhoods of St. Louis or Kansas City. D.App. 5. His opinion would be the same for a lawsuit involving minority neighborhoods in Kansas as it would be for

Missouri. D.App. 6.

In short, petitioners' theory was that they had standing to sue for indirect injury, based on:

A. A legal theory of metropolitan-wide indirect injury, which is wrong as a matter of law; and

B. A factual theory contrived by a one-size-fits-all expert who admittedly could not testify that the relief requested would redress the alleged injury.

Not surprisingly, the District Court held that petitioners had not established an indirect injury sufficient to give them standing to sue Liberty Mutual or Old Reliable. App. 20a.

Conclusion

For these reasons, Liberty Mutual and Old Reliable respectfully pray that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX

Deposition of Richard Drogin, taken February 17, 1997:

Q. Let's use Table 1a in Exhibit 401. Would you agree with me that according to your Table 1a in Exhibit 401, Liberty Mutual has a statistically significant excess of Type A policies in areas with over 50 percent minority population?

A. That would be a correct interpretation of this data, yes.

Q. And would you agree with me that in Exhibit 1 - or Table 1b of Exhibit 401, Liberty Mutual, the figures show an excess of Type A policies in high-minority areas defined as over 75 percent minority population, although you don't show that excess as being a statistically significant excess?

A. That's a correct statement.

[Deposition Page 362, lines 7-23]
Appellees' Joint Appendix 2711

Expert Report of Gregory D. Squires, Ph.D.:

14. The lack of affordable insurance coverage in minority neighborhoods has a substantial impact on all persons living in the affected minority areas. Insurance redlining is a contributing cause to the continuing pattern of racial segregation and the deterioration of minority communities found in urban areas throughout the United States, including Kansas City and St. Louis. Insurance redlining makes it more difficult for persons living in minority areas to obtain the credit necessary to purchase homes or to maintain businesses. As stated in 1968 by the President's National Advisory Panel: "[i]nsurance is essential to revitalize our cities. It is a cornerstone of credit. Without insurance, banks and other financial institutions will not - and cannot - make loans. New housing cannot be constructed, and existing housing cannot be repaired. New business cannot expand, or even survive." As a result of this lack of credit, areas subjected to insurance redlining deteriorate. Again as stated by the President's National Advisory Panel, "[w]ithout insurance, buildings are left to deteriorate; services, good and jobs diminish. Efforts to rebuild our nation's inner cities cannot move forward. Communities without insurance are communities without hope." Even defendant State Farm has conceded that "there is an urban insurance availability problem which is contributing to and aggravating the overall urban problem." The final result is an overall diminishment of property values, and a damage to quality of life.

[Report ¶ 14]
Appellants' Substituted Separate Appendix 590-91

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Now, you've mentioned that there were a series of contributors to the damage then suffered by the minority neighborhoods in St. Louis and Kansas City. You've said in the Milwaukee deposition that one cannot rank how significant the role of insurance companies has been relative to other actors, but would say that it is significant - that its significance is due to the financial side of the industry. You can't quantify the impact insurers have had on the decline or would have had if they acted differently. Do you recall that testimony?

A. I do.

Q. And is that an accurate statement of your views today?

A. Yes, yes. Could I - I want to be clear. I haven't reread that statement, but -

Q. Do you want to?

A. Well, what I'm saying is, if one were to generate a list of every conceivable factor - which I believe we did not do in that context - I'd be prepared to start ranking. But you mentioned three or four other factors and I would concur that among those factors, that I would not want to do the kind of ranking that I indicated in that statement. So that would hold - my opinion would hold today as it did then.

Q. And you also said there that what is more difficult to discern is the precise forces that are responsible for the decline in these neighborhoods. That - is that also true in your view today?

A. Well, yes, but. I mean, again, literally, yes, that's true, but that - without reading the full context in which that was said, I don't want to suggest that we are in - we are unknowing about the kind of forces that affect, or have affected, urban development.

[Deposition Page 108 line 17 through Page 110 Line 6]
Appellees' Joint Appendix 1903-05

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Have you conducted any studies of housing or insurance or any other features of St. Louis and Kansas City, specifically?

A. No.

[Deposition Page 47 lines 14-17]
Appellees' Joint Appendix 1888

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Are you familiar with the various neighborhoods in St. Louis and Kansas City?

A. No.

[Deposition Page 58 lines 15-17]
Appellees' Joint Appendix 1894

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Okay. And if a lawsuit were filed tomorrow in the state of Kansas, rather than Missouri, naming any of these defendants, Paragraph 14 would still be the same for you, right?

A. Well, if the information that I had on them was similar to the information that I've been given on these 13, probably the same.

[Deposition Page 187 line 22 through Page 188 line 3]

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. And you also said that what is more difficult to discern is the precise forces that are responsible for the decline in these neighborhoods. That - is that also true in your view today?

A. Well, yes, but. I mean, again, literally, yes, that's true, but that - without reading the full context in which that was said, I don't want to suggest that we are in - we are unknowing about the kind of forces that affect, or have affected, urban development.

Q. Okay. You were asked what the primary forces were as causes of these damages, and you said that - I'm quoting to you from Page 324 of your deposition - "I think the job loss, the flight of particularly manufacturing industries and other firms out of the city, the flow of capital, the movement of capital from central cities to suburban areas and increasingly other regions of the country and around the world, government policy, often encourages and reinforces a shift of private resources. I think that certainly in terms of the issue of racial segregation, steering practices by realtors, the use of race in appraisals of property and the role of insurance in mortgage lending discrimination, zoning ordinances, zoning rules by all levels of government, have contributed to a segregation."

Do you remember that testimony, or is that still your - still your view?

A. That is certainly roughly still my view, and I think I do remember it.

[Deposition Page 109 line 21 through Page 111 line 4]
Appellees' Joint Appendix 1904-06

Deposition of Gregory D. Squires, Ph.D. taken February 27, 1997:

Q. Now, flipping back to your CV again, I think you probably just answered the question but just to be sure, you list a host of publications beginning on Page 2 and running for several pages. Do any of those address Kansas City or St. Louis, specifically?

A. The answer to that is yes and no. I mean, none of those, as I recall, are based on empirical data that was collected out of St. Louis or Kansas City, but the issues that are addressed in each of these studies, in many cases we have maintained that these issues are clearly not unique to the city from which the data came from. And in the literature reviews, we may have drawn from studies that have - that were done in Kansas City or St. Louis. I don't know for sure.

[Deposition Page 48 lines 8-24]
Appellees' Joint Appendix 1889

No. 98-788

Supreme Court, U.S.
FILED
1998

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CYNTHIA E. CANADY, *et al.*,
Petitioners,
v.
ALLSTATE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF STATE FARM FIRE AND CASUALTY COMPANY, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Petition for Writ of Certiorari should be granted even though the District Court correctly applied this Court's precedents in dismissing plaintiffs' industry-wide action against 23 insurance companies under the Fair Housing Act for lack of standing at the class certification phase after extensive discovery revealed that the plaintiffs had no evidence to support their allegations of indirect injury.

2. Whether the Petition for Writ of Certiorari should be granted even though the plaintiffs' Fair Housing Act claims were dismissed by the District Court without prejudice to each plaintiff's right to refile claims against those defendants that allegedly caused injury to the plaintiff, and plaintiffs in fact have refiled separate actions against most of the defendants reasserting Fair Housing Act claims.

PARTIES TO THE PROCEEDINGS BELOW AND RULE 29.6 STATEMENT

Petitioners:

Cynthia E. Canady; Marva Jean Saunders; Mischelle A. Greer; Jimmy D. Hunt; Tamara A. Hunt; Kim Y. Nickerson; Esther E. Moten; Kerry L. Butler; Nadine Farris; Charles Lockridge; Coleman McClain; Evalin McClain; Alma Hammonds; John Hammonds; Sara Kenner; and Clarence Kenner.

Respondents:

Allstate Insurance Company; American Family Mutual Insurance Company; American Economy Insurance Company; American States Insurance Company; American States Preferred Insurance Company; Federal Insurance Company; Pacific Indemnity Insurance Company; Vigilant Insurance Company; Sun Insurance Office of America, Inc.; Sea Insurance Company of America; Liberty Mutual Insurance Company; Farm Bureau Town & Country Insurance Company; Farmers Insurance Exchange; Fire Insurance Exchange; Mid-Century Insurance Company; Farmers & Merchants Insurance Company; Prudential Property and Casualty Insurance Company; Safeco Insurance Company of America; Shelter Mutual Insurance Company; Shelter General Insurance Company; State Farm Fire and Casualty Company; State Farm General Insurance Company; and Old Reliable Casualty Company.

This Opposition is being filed on behalf of the following respondents: State Farm Fire and Casualty Company, State Farm General Insurance Company, Allstate Insurance Company, Safeco Insurance Company of America, American States Insurance Company, American Economy Insurance Company, American States Preferred Insurance Company, and Prudential Property and Casualty Insurance Company.

State Farm Mutual Automobile Insurance Company is the parent company to both State Farm Fire and Casualty Company and State Farm General Insurance Company. Neither State Farm Fire and Casualty Company nor State Farm General Insurance Company have any nonwholly owned subsidiaries.

Allstate Insurance Company is a wholly owned subsidiary of the Allstate Corporation. Allstate Insurance Company does not have any nonwholly owned subsidiaries.

Safeco Corporation is the parent company to Safeco Insurance Company of America and American States Financial Corporation. American States Financial Corporation is the parent company of American States Insurance Company, which is the parent company of American Economy Insurance Company and American States Preferred Insurance Company. Safeco Insurance Company of America, American States Insurance Company, American Economy Insurance Company and American States Preferred Insurance Company do not have any nonwholly owned subsidiaries.

The Prudential Insurance Company of America is the parent company of Pruco, Inc. Pruco, Inc. is the parent company to Prudential Property and Casualty Insurance Company. Prudential Property and Casualty Insurance Company is the parent company to Prudential General Insurance Company, Prudential Commercial Insurance Company, Prudential Insurance Brokerage Inc., and Merastar Insurance Company. There are no nonwholly owned subsidiaries of Prudential Property and Casualty Insurance Company.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-788

CYNTHIA E. CANADY, *et al.*,
Petitioners,

v.

ALLSTATE INSURANCE COMPANY, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF STATE FARM FIRE AND CASUALTY COMPANY, ET AL., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The petition for a writ of certiorari should be denied. It seeks review of a unanimous, unpublished per curiam decision of the Eighth Circuit, which disposed of petitioners' appeal from a District Court decision under Circuit Rule 47B, reserved for instances in which "an opinion would have no precedential value." 8th Cir. R. 47B. *See* Pet. App. at 3a-4a. Contrary to petitioners' contention, neither the Court of Appeals nor the District Court ruled that a claim of indirect injury was insufficient to support standing under the Fair Housing Act and nothing in their rulings conflicted with this Court's precedents in any manner. Instead, the District Court—after recognizing that such allegations *could* support standing—found that in this particular case petitioners had failed to come forward

with any record evidence substantiating their broad allegations. The question presented is thus the intensely fact-specific one of whether the District Court—upheld by the Court of Appeals, with no recorded dissent on petition for rehearing en banc—erred in determining that petitioners had failed to come forward with facts supporting their standing allegations. Such a fact-based question does not satisfy this Court's criteria for granting certiorari, *see* S. Ct. Rule 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings"), and the petition accordingly should be denied.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutory provisions reproduced in the petition, Pet. at 1-2, this case also implicates Article III, Section 2 of the United States Constitution, which extends "[t]he judicial Power . . . to all Cases [and] . . . Controversies . . ."

STATEMENT OF THE CASE

This case involves the plaintiffs' attempt to prosecute an industry-wide class action lawsuit under the Fair Housing Act,[1] 42 U.S.C. § 3601 *et seq.*, on behalf of all the homeowners residing in 25 different "predominantly minority" zip codes in St. Louis and Kansas City, Missouri. Plaintiffs filed their suit against 23 insurance companies—which comprise most of the homeowners insurance market

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[1] Plaintiffs' initial Complaint asserted claims against the defendants under the Fair Housing Act, 42 U.S.C. § 3604(a) and (b), the federal Civil Rights Acts, 42 U.S.C. §§ 1981, 1982, and 1985(3), and under Missouri common law prohibiting civil conspiracy. Plaintiffs' Section 3604(a) and federal and common law conspiracy claims were dismissed early in the case, and plaintiffs do not challenge that decision here. Plaintiffs likewise do not challenge the District Court's dismissal of their claims under Sections 1981 and 1982 for lack of standing.

in Missouri alleging that each of the defendants had engaged in discriminatory sales, pricing, and underwriting practices in the sale of their homeowners insurance products. Plaintiffs claimed that the asserted class and each of them had been injured by the acts of every defendant because every defendant's conduct allegedly contributed to and caused indirect injury to each plaintiff in the form of diminished property values.

Initially, several defendants moved to dismiss plaintiffs' Fair Housing Act and other civil rights claims for lack of standing. Those insurers argued that plaintiffs who had no contact with them could not adequately allege that the insurer had caused them any harm. The District Court denied those initial motions. Relying directly on this Court's decision in *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979), the District Court held that at the pleading stage, a plaintiff's allegations of indirect injury fairly traceable to a defendant's actions must be taken as true and can support a claim under the Fair Housing Act.

The District Court then directed the parties to prepare the case for determination of the class certification issue. The District Court ordered the parties to engage in phased discovery, with the first phase devoted to the question of whether plaintiffs' proposed class could be certified. While plaintiffs describe this discovery as "limited" (*see* Pet. at 4), it actually was very extensive and intensive.[2] Among the primary contentions plaintiffs sought to establish during class certification discovery were (i) that each named plaintiff had suffered indirect injury, as alleged, and (ii) that the existence of indirect injury in the form of diminished property values would be a common issue of fact upon which certification of a class could be based.

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[2] Over the course of three months, more than fifty witnesses were deposed, and defendants produced tens of thousands of documents. Expert discovery was also conducted, involving the production of hundreds of pages of expert reports and the depositions of plaintiffs' four experts and eight defense experts.

The parties developed an extensive record for the District Court's consideration in connection with plaintiffs' motion for class certification. That evidence demonstrated that the defendants did not have common underwriting, rating, or sales practices.[3] The evidence also demonstrated that *none* of the named plaintiffs had dealt directly with every one of the defendants, and that several of the defendants had never been the subject of any contact or attempted contact at all with any of the named plaintiffs. Most significantly, plaintiffs failed to develop or submit any competent evidence that the named plaintiffs and the proposed class suffered indirect injury in the form of diminished property values as a result of any of the defendants' alleged conduct, and indeed, the evidence was to the contrary. For example, several of the individual plaintiffs and a local realtor, who was plaintiffs' witness, testified to increases in the value of homes in the minority neighborhoods plaintiffs sought to represent, underscoring the absence of any common, indirect injury of diminution in property values.[4] In addition, several of the named plaintiffs admitted that they were able to purchase the type of coverage they desired, undercutting plaintiffs' allegation that diminished property values resulted from the defendants' alleged refusal to sell homeowners insurance in the zip code "neighborhoods."

The only evidence plaintiffs submitted to the District Court to support the existence of a supposed widespread common injury of diminished property values in minority neighborhoods was a statement by one of their experts, a sociologist. The sociologist stated in his expert report that "property owners within minority neighborhoods in Kansas City and St. Louis have suffered damage as a result of the alleged conduct of the defendants, whether they have ever personally dealt with the defendants or

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[3] Def. Jt. App. at Vol. XIII, 2530-32, 2442-43, 2554-78.

[4] Def. Jt. App. at Vol. V, 1039-40, 1165-66, 1175-76; Vol. VI, 1243, 1246-47, 1284; Vol. VIII, 1781-82.

not, and regardless of their own personal experiences with homeowners insurance." Pl. App. at 390-91. The sociologist, however, admitted during discovery that his opinion regarding the existence of a diminution in property values was based on assumption only, and conceded that he had not performed an analysis of housing values in Kansas City or St. Louis.[5]

At the close of class certification discovery, the District Court took plaintiffs' motion for class certification and the parties' evidentiary submissions and briefs under consideration. At the same time, one of the defendants (Old Reliable Casualty Company) submitted summary judgment papers renewing its challenge to plaintiffs' claims for lack of standing. After reviewing the parties' extensive submissions, the District Court entered an order denying plaintiffs' request for class certification and dismissing plaintiffs' claims without prejudice. First, the District Court correctly rejected plaintiffs' proposed class definition of homeowners from 35 different zip codes spanning two different cities as overbroad. The District Court stated that:

> By plaintiffs' calculus, a neighborhood is defined by zip code boundaries. However, especially in urban areas, several distinct neighborhoods are often lumped together in one zip code. Historic homes and expensive neighborhoods are sometimes included [in] the same minority zip codes as contain less economically desirable neighborhoods. For this and other reasons,

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[5] Def. Jt. App. at Vol. VIII, 1888, 1894. Plaintiffs also improperly attempted to bolster their claims and bid for class certification (and their Petition before this Court) by claiming that an internal document purportedly written by an employee of the Missouri Department of Insurance constituted a conclusion *by* the Department that the defendants were engaged in redlining. However, an official representative from the Department specifically repudiated plaintiffs' characterization that the document constituted a pronouncement by the Department, and further denied that the Department had made any finding that the Defendants had engaged in redlining. Dep. of Stephen Stark at 370-76.

> some of the distinct neighborhoods within particular minority zip codes are not comprised primarily of minority-owned homes.

Pet. App. at 9a.

The District Court also rejected plaintiffs' assertion that they had presented evidence proving that everyone residing within one of the 25 predominantly minority zip code "neighborhoods" had suffered a diminution in property values.

> [P]laintiffs have actually not so proven. A class comprised of every predominantly minority zip code in Kansas City and St. Louis, Missouri, numbering at least 93,000 persons is not the "relatively compact neighborhood" envisioned by *Gladstone Realtors v. Bellwood*, 441 U.S. 91, 114 (1979), and plaintiffs have not borne their burden of proving that every person living within a predominantly minority zip code has suffered injury in fact. *See South Suburban Housing Center v. Sauterfort Real Estate, Inc.*, 658 F. Supp. 1430, 1438-37 (N.D. Ill. 1987).

Pet. App. at 9a.

The District Court next examined whether plaintiffs could continue to pursue their action based on allegations of *direct* injury attributable to all 23 defendants. The District Court found insufficient support for standing under that theory as well. As the District Court correctly recognized, each of the named plaintiffs had affirmatively testified that they could only recall contacting at *most* a handful of the defendants, many had successfully obtained precisely the type of homeowners coverage they desired from one or the other of the defendants, and many further admitted that they had no complaints about their coverage. Thus, the District Court properly ruled that "where different members of the proposed plaintiff class have allegedly suffered due to the illegality of one or more—but less than all—of the defendants, certification is not proper against such a class of unrelated defendants. . . ." Pet. App. at 15a.

The District Court held that plaintiffs could not maintain their case in the form they had chosen—an industry-wide action against numerous, unrelated insurers who had engaged in different practices and had different dealings, if any, with different plaintiffs. However, the District Court dismissed plaintiffs' claims *without prejudice*, leaving "each plaintiff who chooses to do so" free to "refile against the defendant or defendants with whom each plaintiff has alleged grievances." Pet. App. at 20a. Plaintiffs have taken full advantage of this opportunity—they have filed separate proposed class actions asserting Fair Housing Act claims against most of the defendants in this case, and those new suits remain pending before Judge Gaitan in the United States District Court for the Western District of Missouri.

REASONS FOR DENYING THE WRIT

This is not a case calling for an exercise of this Court's supervisory power. Plaintiffs have asked this Court to grant their petition for a writ of certiorari because the decisions of the courts below supposedly "conflict[] directly with three prior opinions of this Court" and allow standing under the Fair Housing Act only upon a showing of direct injury. Pet. at 4, 5. Plaintiffs' contentions, however, flatly misrepresent the decisions they challenge. What the District Court and the Eighth Circuit actually held was that while allegations of indirect injury may be sufficient to support a Fair Housing Act complaint at the *pleading* stage, once it became clear that plaintiffs could not demonstrate that they actually suffered an alleged indirect injury fairly traceable to defendants' conduct, dismissal of their claims for lack of standing was required. The lower courts' decisions are entirely consistent with this Court's jurisprudence on the issue of standing under the Fair Housing Act, and the decisions in no way threaten either this Court's authority or the continued vitality of the Fair Housing Act. Indeed, far from being denied an opportunity to prosecute Fair Housing Act

claims for injuries other than the diminution in property values they could not prove, plaintiffs were permitted to "refile against the defendant or defendants with whom each plaintiff has alleged grievances." Pet. App. at 20a. They have in fact refiled separate actions against most of the insurer defendants. There is no basis for this Court's involvement in this matter.

I. THE DECISIONS PLAINTIFFS CHALLENGE ARE ENTIRELY CONSISTENT WITH SUPREME COURT PRECEDENT.

A. Established Standing Jurisprudence Requires That An Action Be Dismissed If A Plaintiff Clearly Cannot Prove Actual Injury Fairly Traceable To The Conduct Of Defendants.

Throughout their Petition, plaintiffs invoke their allegations of indirect injury as if those mere allegations guaranteed them the right to proceed all the way to trial of their Fair Housing Act claims, regardless of the development of evidence during the pretrial phase of the case. That is simply incorrect, and none of this Court's prior decisions so hold.

Regardless of the nature of the claim a plaintiff seeks to pursue, under the irreducible, minimum Article III requirements for standing,[6] a plaintiff whose standing is

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[6] This Court has previously articulated the fundamental elements of Article III standing:

> Over the years, our cases have established that the irreducible constitutional minimum of standing contains three elements. First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the

based on an alleged indirect injury must, as the case progresses, *demonstrate* that he or she *actually suffered* that indirect injury. As this Court explained long ago, the fact that the federal courts are courts of limited jurisdiction:

> precludes the idea that jurisdiction may be maintained by mere averment or that the party asserting jurisdiction may be relieved of his burden by any formal procedure. If his allegations of jurisdictional facts are challenged by his adversary in any appropriate manner, he must support them by competent proof.

McNutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936). At the pleading stage, the standing allegations must be accepted as true, but as the case proceeds, "the allegations must be true and capable of proof at trial." *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 (1973). Allegations suffice at the outset, but at later stages of the case, the facts supporting standing "must affirmatively appear in the record." *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 546 (1986).

This Court has held that allegations of indirect injury in a Fair Housing case are sufficient to establish standing *at the pleading stage*, and nothing in the District Court or Court of Appeals opinions is to the contrary. But this Court's cases establish two other principles that petitioners ignore. The first is that as a case proceeds, a plaintiff has an ongoing obligation to demonstrate that he or she continues to have standing to proceed with his or her claims. *See Lujan*, 504 U.S. at 560-61. The second is that whether a plaintiff's standing is based on allegations of indirect or direct injury, the plaintiff's claims cannot

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court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

proceed in the face of evidence he or she did not actually suffer "injury in fact." *Id.*, at 561. Thus, it is plaintiffs' contention that their claims should have been permitted to proceed despite their inability to demonstrate actual indirect injury that flies in the face of long-established standing jurisprudence.

B. The Courts Below Did Not Reject This Court's Recognition In *Havens*, *Gladstone*, and *Trafficante* That An Actual Indirect Injury May Satisfy The Standing Requirements For A Fair Housing Act Claim.

At the pleading stage of this case, the District Court accepted as true plaintiffs' allegations that the defendants' actions had caused a diminution in the value of their own homes and those of all homeowners within the "minority neighborhoods," whom plaintiffs sought to represent. Accordingly, the District Court initially denied various defendants' motions to dismiss plaintiffs' Fair Housing Act claims based on lack of standing. The District Court, citing to this Court's decisions in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and to *Gladstone, Realtors v. Bellwood*, 441 U.S. 91 (1979), specifically stated that Fair Housing Act claims need meet only the constitutional minimum of Article III standing, and that *allegations* of indirect injury are sufficient to support a plaintiff's standing under the Act *at the pleading stage* of litigation. *See* Pet. App. at 28a-29a.[7]

Although the plaintiffs acknowledge the District Court's initial ruling on the issue of standing, they complain that the District Court (with the blessing of the Eighth Circuit) inexplicably "seized" the opportunity at the close of class certification discovery to "reverse[] its earlier

[7] The decision set forth at Appendix D to plaintiffs' Petition is incorrectly captioned as an "Order of the United States Court of Appeals for the Western District of Missouri, Western Division," but in fact was a decision by the District Court.

decision regarding claims of indirect injury" and to dismiss plaintiffs' claims. Pet. at 4. According to plaintiffs, the District Court in its subsequent decision rejected the very concept of indirect injury claims under the Fair Housing Act. *Id.* Neither the District Court nor the Eighth Circuit, however, embarked upon any such departure from Supreme Court precedent.

Plaintiffs contend that the District Court defied this Court's decisions in *Havens, Gladstone,* and *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205 (1972), when dismissing their case. Plaintiffs' contention is meritless. Each of the decisions they cite evaluated whether Fair Housing Act claims of plaintiffs alleging indirect injury as a result of discriminatory practices could survive motions to dismiss. None of these cases stands for the proposition that a plaintiff who has suffered no *actual* injury (whether direct or indirect) may continue to pursue an industry-wide Fair Housing Act claim.

In *Trafficante,* 409 U.S. at 205, this Court held that minority and non-minority tenants of a single apartment complex had standing to sue their landlord under the Fair Housing Act for the landlord's alleged refusal to rent to minorities. The plaintiffs there alleged that they had suffered humiliation and embarrassment, and had lost the benefits of living in an integrated community, as a result of the landlord's alleged conduct. *Id.* at 208. Considering the case only on the pleadings and not in the context of a class certification motion, the District Court dismissed the plaintiffs' complaint for lack of standing, the Ninth Circuit affirmed, and this Court then reversed the order of dismissal. *Id.* Noting that "[w]hat the *proof* may be is one thing," this Court held that "insofar as tenants of the same housing unit that is charged with discrimination" were concerned, the plaintiffs had adequately *alleged* individual injury or injury in fact. *Id.* at 209-10 (emphasis added).

In *Gladstone*, 441 U.S. 91, this Court again held that at the pleading stage, allegations of indirect injury are sufficient to supply the Article III standing required to state a viable claim for relief under the Fair Housing Act. The plaintiffs in *Gladstone* were the Village of Bellwood and six individuals who claimed that they had been injured by the realtors' racial steering within a 12- by 13-block area of Bellwood because they had been " 'denied their right to select housing without regard to race and have been deprived of the social and professional benefits of living in an integrated society.' " *Id.* at 95. This Court held that the plaintiffs living within the identified area had adequately alleged an injury that might be fairly traceable to the alleged discriminatory conduct of the defendants, but further held that plaintiffs living outside the "target neighborhood" lacked standing to assert claims for injunctive relief. *Id.* at 112-14; *see also Urban Contractors Alliance v. Bi-State Development Agency*, 531 F.2d 877, 880 (8th Cir. 1976) (plaintiffs lacked standing where they did not live in an allegedly affected community or belong to any other affected group).[8] Then, this Court specifically noted that the question before it was whether plaintiffs' allegations were sufficient "at the pleading stage," and also noted that at later stages of the case, plaintiffs' allegations would be subject to proof before the District Court, such as "convincing evidence that the economic value of [a plaintiff's] own home has declined." *Gladstone*, 441 U.S. at 112-13, 115.

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[8] Plaintiffs grossly overstate this Court's decision in *Gladstone* when they claim that this Court in that case "allowed standing to every homeowner in the Village of Bellwood." Pet. at 9. This Court did no such thing. This Court merely addressed whether the plaintiff Village and the six individual plaintiffs had standing to sue, at the pleading stage, based on alleged indirect injury, and further emphasized that a critical element of standing for *any* Fair Housing Act plaintiff still requires ultimate proof of an actual, genuine injury in one form or another. *Gladstone*, 441 U.S. at 114.

Finally, this Court's decision in *Havens*, 455 U.S. 363, again reaffirmed what is not put at issue by the Petition—that at the pleading stage, allegations of indirect injury can be sufficient to support a plaintiff's standing to sue under the Fair Housing Act. *Havens*, like *Gladstone*, involved claims of racial steering by the owner of two apartment complexes. The plaintiffs alleged that they and the residents of an entire county of over 170,000 people all had suffered indirect injury as a result of the defendants' alleged intentional discrimination. *Id.* at 377 & n.18. This Court ruled that plaintiffs had not adequately defined a neighborhood which could plausibly have experienced the injury alleged: "It is indeed implausible to argue that petitioners' alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area." *Id.* at 377. This Court nevertheless declined to dismiss the plaintiffs' complaint *at the pleading stage*, and instead permitted the case to proceed for "further factual development" that would allow the plaintiffs to refine the allegations of their complaint. *Id.*

Neither *Havens*, *Trafficante*, nor *Gladstone* stands for the proposition that a federal district court must continue to entertain Fair Housing Act claims *even after* discovery reveals that there is no evidence to support the existence of a plaintiff's alleged indirect injury. The District Court in this case, consistent with the three decisions of this Court that plaintiffs have invoked, accepted plaintiffs' allegations of indirect injury as true during the pleading stage of the case. The District Court here, consistent with well-established standing jurisprudence, gave plaintiffs the opportunity to conduct discovery during the class certification phase to demonstrate that the existence of their alleged indirect injury would be a common issue in the action. When plaintiffs could not meet even *that* minimal evidentiary threshold, it was not only appropriate for the District Court to reject plaintiffs' alleged indirect injury as

a basis for their standing, it was incumbent upon the District Court to do so.

C. It Was Entirely Appropriate For The District Court To Dismiss Plaintiffs' Industry-Wide Challenge After Determining That Their Claim Of Indirect Injury Was Insupportable.

Plaintiffs suggest that the District Court erred in reexamining their standing after the close of class certification discovery. Pet. at 11. That misstates the law. Standing "is perhaps the most important of [the jurisdictional] doctrines," and federal courts are under a continuing obligation independently to reexamine whether standing exists as a case proceeds. *Allen v. Wright,* 468 U.S. 737, 750 (1984); *see also State of Missouri ex rel. Missouri Highway & Transp. Comm'n v. Cuffley,* 112 F.3d 1332, 1334 (8th Cir. 1997). Because the elements of standing "are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each [standing] element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., *with the manner and degree of evidence required at the successive stages of the litigation.*" *Lujan,* 504 U.S. at 561 (emphasis added).

The District Court clearly understood its ongoing obligation to reexamine the plaintiffs' standing at each successive stage of the case. Indeed, the District Court expressly acknowledged that although plaintiffs' allegations had been sufficient to survive a motion to dismiss at the initial stage of the case, the absence of standing was clearly evident after class certification discovery had been conducted:

> In the early stage of this litigation, the court denied defendants' motion to dismiss on standing grounds, recognizing that an indirect injury is often sufficient to establish standing to sue if the injury is fairly traceable to the conduct of the defendants.

> Order dated October 10, 1996, p. 4. When ruling a motion to dismiss, the court must grant every reasonable inference to the plaintiffs. *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986). Dismissal of plaintiffs' case on standing grounds would have been premature at that stage because the class was not well-defined and class discovery had not yet taken place.
>
> As litigation progresses, however, and the facts and basis of the litigation become apparent, reasonable inferences are no longer afforded and plaintiffs allegations must clearly indicate that standing is proper. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Although standing and class certification are separate and distinct issues, an unfavorable analysis by the court of the class certification issue, especially with regard to the typicality requirement of Rule 23(a)(3), often makes evident that standing is also lacking.

Pet. App. at 18a-19a.

Class certification discovery in this case revealed that plaintiffs' standing allegations were based on wholly unsupported contentions of indirect injury spanning multiple areas in two different cities. Plaintiffs failed to identify any evidence demonstrating that any particular neighborhood or group of individuals in fact suffered a diminution in the value of their homes. Moreover, instead of identifying the type of "relatively compact" neighborhood from which a court could ever find effects fairly traceable to a defendant's conduct, the "neighborhood" plaintiffs identified encompassed 25 zip codes in Kansas City and St. Louis, and assertedly includes more than 93,000 people. *See* Pl. App. 106, 113. The vast area encompassed by plaintiffs' proposed class definition is precisely the type of area that this Court has cautioned against as "so extensive in area, so heavily or even so sparsely populated, or so lacking in shared social and commercial intercourse that there would be no actual injury to a particular resident."

Gladstone, 441 U.S. at 114. Plaintiffs likewise failed to show that any alleged "diminution" in property values could ever be fairly traceable to any of the defendants.[9] Based on this record, it was entirely appropriate for the District Court to reject plaintiffs' unsupported allegations of diminished property values as a basis for the continued prosecution of their industry-wide challenge against multiple, unrelated defendants.

As the court in *Washington v. Vogel,* 156 F.R.D. 676 (M.D. Fla. 1994), succinctly stated when dismissing an organization's civil rights claims for lack of standing at the class certification stage of the proceeding:

> Were this case at the motion to dismiss stage, the Court would be required to accept as true the plaintiffs' allegations concerning standing. . . . However, this . . . action has been pending for nearly a year. The parties have engaged in extensive discovery. . . . Under these circumstances, the plaintiffs cannot rest on mere allegations in the pleadings . . . .

Id. at 682 (citations omitted). Indeed, it was inherent in the District Court's consideration of plaintiffs' motion for class certification for the District Court also to examine the issue of standing because Rule 23(a), Fed. R. Civ. P. 23(a), implicitly requires plaintiffs to show they are part of the proposed class and that they "possess the same interest and suffered the same injury as the class mem-

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[9] To demonstrate such a causal link, plaintiffs first would need to separate the impact of any conduct by each defendant from all the other factors which affect property value, then demonstrate that the injury could be attributed to each defendant individually, and finally show that any individual homeowner was injured in the manner alleged. *Jorman v. Veterans Admin.*, 830 F.2d 1420, 1425-27 (7th Cir. 1987) (plaintiffs lacked standing where they were unable to show that racial segregation in the Marquette Park neighborhood of Chicago was fairly traceable to the VA's mortgage lending activities); *see also Vann v. Housing Authority of Kansas City, Mo.*, 87 F.R.D. 642, 651 (W.D. Mo. 1980).

bers."[10] At later stages of a case, "'[n]o presumptive truthfulness attaches to the plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Moreover, the plaintiff will have the burden of proof that jurisdiction does in fact exist.'" *Osborn v. United States,* 918 F.2d 724, 730 (8th Cir. 1990) (quoting *Mortensen v. First Federal Sav. & Loan Ass'n.,* 549 F.2d 884, 891 (3d Cir. 1977)).

Plaintiffs had ample opportunity during the class certification phase of the case to develop and submit evidence of a common, indirect injury of diminished property values to support their request for class certification. Significantly, plaintiffs have offered no argument or any direct challenge at all to the District Court's factual determination that their evidence on that point was insufficient.[11] That plaintiffs simply failed to meet their burden

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[10] *Bishop v. Committee on Professional Ethics,* 686 F.2d 1278, 1287-89 (8th Cir. 1982) (citing *East Texas Motor Freight System, Inc. v. Rodriguez,* 431 U.S. 395, 403 (1977)); *see also Central Wesleyan College v. W.R. Grace & Co.,* 6 F.3d 177, 188 (4th Cir. 1993) (quoting *Sosna v. Iowa,* 419 U.S. 393, 402 (1975)) ("In the class action context, the . . . Article III requirement must be met 'at the time the complaint is filed, and at the time the class action is certified by the District Court pursuant to Rule 23.'"); *Griffin v. Dugger,* 823 F.2d 1476, 1482 (11th Cir. 1987), *cert. denied,* 486 U.S. 1005 (1988).

[11] The District Court's factual determination that plaintiffs lacked standing to sue based on their alleged indirect injury is entitled to deference, and may only be overturned if clearly erroneous. *Osborn,* 918 F.2d at 729-30. A district court has "'broader power to decide its own right to hear [a] case than it has when the merits of the case are reached.'" *Id.* (quoting *Williamson v. Tucker,* 645 F.2d 404, 413 (5th Cir.), *cert. denied,* 454 U.S. 897 (1981)).

to establish standing certainly does not create an issue worthy of an exercise of this Court's supervisory powers.

II. THE DISTRICT COURT'S DISMISSAL OF PLAINTIFFS' ASSERTED INDUSTRY-WIDE CLASS ACTION WITHOUT PREJUDICE, WHICH ALLOWED PLAINTIFFS TO REFILE ACTIONS AGAINST INDIVIDUAL DEFENDANT COMPANIES, POSES NO THREAT TO THE CONTINUED VITALITY OF THE FAIR HOUSING ACT.

Plaintiffs make the baseless assertion that the District Court's dismissal of their improperly-framed, industry-wide challenge will eviscerate the Fair Housing Act. As set forth above, the District Court's ruling is entirely consistent with Fair Housing Act jurisprudence. Moreover, plaintiffs failed to inform this Court that the District Court's dismissal order was without prejudice, that plaintiffs were expressly granted leave to refile their Fair Housing Act challenges as separate suits against the individual defendant companies with whom they had direct contact, and that plaintiffs have in fact refiled separate Fair Housing Act lawsuits as asserted class actions against most of the 23 defendants in *Canady*. There is no reason for this Court to become involved now in *Canady* or its progeny.

Once it was clear that plaintiffs could not establish standing to sue all the defendants in a single action based on their alleged *indirect* injury, the District Court considered whether plaintiffs' allegations of *direct* injury were sufficient to support the continued pendency of their industry-wide action. Class certification discovery, however, had revealed that none of the individual plaintiffs had or could allege that he or she suffered injury as a result of direct contact with every one of the defendants. Some of the defendants were not contacted by any plaintiffs, and no single plaintiff contacted even a majority of the defendants. Several plaintiffs admitted that they were not dissatisfied with the products, prices, or services they received from certain of the defendants they had con-

tacted. *See* Jt. App. Vol. V, 1000-12. In short, there was no basis for an industry-wide challenge.

It is a basic tenet of jurisdictional law that in a multiple-defendant action, *each* plaintiff must establish standing to sue *each* party named as a defendant. *Warth v. Seldin*, 422 U.S. 490, 502 (1975); *La Mar v. H&B Novelty & Loan Co.*, 489 F.2d 461, 469-70 (9th Cir. 1973). Numerous courts have rejected a plaintiff's standing to sue multiple defendants where the plaintiff could not establish injury attributable to the conduct of each defendant.[12] The District Court here followed the Ninth Circuit's decision in *La Mar*, once it had determined that plaintiffs could not support their indirect injury claims, and correctly concluded that plaintiffs could not proceed against those defendants with whom they had not even attempted any contact or dealing:

> While a plaintiff would have standing to represent a class of similarly situated persons who had allegedly suffered injury by the same defendant, that plaintiff

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[12] *See La Mar*, 489 F.2d at 469-70; *Angel Music, Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 75-76 (S.D.N.Y. 1986) (copyright owner lacked standing to assert class action against members of the television industry with whom it had not dealt); *accord, Thompson v. Board of Educ.*, 709 F.2d 1200, 1204-05 (6th Cir. 1983) (teachers lacked standing to assert class action against school districts for which they had not worked); *Pope v. City of Clearwater*, 138 F.R.D. 141, 145 (M.D. Fla. 1991) (applicant for utility service lacked standing to assert class action against municipalities to which it had not applied); *Akerman v. Oryx Communications, Inc.*, 609 F. Supp. 363, 377 (S.D.N.Y. 1984) (investors lacked standing to assert class action against underwriters from whom they had not purchased), *aff'd*, 810 F.2d 336 (2d Cir. 1987); *Vulcan Soc'y of Westchester County, Inc. v. Fire Dep't of City of White Plains*, 82 F.R.D. 379, 398-99 (S.D.N.Y. 1979) (firefighters lacked standing to assert class action against municipalities for which they did not work); *Chevalier v. Baird Sav. Ass'n*, 66 F.R.D. 105, 109 (E.D. Pa. 1975) (mortgagors lacked standing to assert class action against lenders from whom they did not borrow); *Weiner v. Bank of King of Prussia*, 358 F. Supp. 684, 694 (E.D. Pa. 1973) (borrower lacked standing to assert class action against banks with which he had no credit transactions).

> would not, in the absence of an alleged conspiracy, have standing to represent a class of all persons similarly situated who have allegedly suffered injury at the hands of different defendants even if those defendants are members of the same industry and the legal violation is allegedly widespread.

Pet. App. at 19a.

Plaintiffs here failed to allege a viable claim of conspiracy against the defendants. In view of the absence of such a viable claim, and the lack of any showing of a common, indirect injury to link the defendants together, the District Court's determination that no plaintiff could proceed against defendants against whom they had alleged no direct injury was clearly correct. *Id.* at 20a. The District Court's decision to dismiss the plaintiffs' improperly framed action, while still allowing the individual plaintiffs leave to file new suits against those defendants they claimed had injured them directly, was entirely consistent with the principles of standing, and did not in any way undermine this Court's precedents or the Fair Housing Act itself.[13]

CONCLUSION

The decisions of the District Court and the Eighth Circuit are entirely consistent with the prior decisions of this Court, and they clearly do not "so far depart[] from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." S. Ct. Rule 10(a), 10(c). For all of the foregoing reasons, the Petition should be denied.

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[13] Although plaintiffs suggest that the District Court's ruling would leave plaintiffs with no ability to sue a defendant who allegedly made "extraordinary efforts to avoid all dealing with homeowners in minority areas," (Pet. at 12) that contention plainly is meritless. A fair reading of the District Court's ruling is that a plaintiff who contacted such a defendant to seek insurance and allegedly suffered discrimination in connection with that contact could pursue a claim against the defendant.

Respectfully submitted,

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